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Supreme Court of the United States

OCTOBER TERM, 1964

No. 291

MINNESOTA MINING AND MANUFACTURING COMPANY, PETITIONER,

vs.

NEW JERSEY WOOD FINISHING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 17, 1964
CERTIORARI GRANTED OCTOBER 19, 1964

No. 291

Office-Supreme Court, U.S.
FILED
JUL 17 1961
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IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Appeal No. 14,487

NEW JERSEY WOOD FINISHING COMPANY,
Plaintiff-Appellee,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Defendant-Appellant,

and ESSEX WIRE CORP.,
Defendant.

IN A PRIVATE ACTION UNDER THE ANTITRUST LAWS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, APPEAL, PURSUANT TO LEAVE, FROM AN INTERLOCUTORY ORDER DENYING MOTION FOR DISMISSAL OF COMPLAINT OR FOR SUMMARY JUDGMENT (HON. ANTHONY T. AUGELLI, U. S. D. J.).

APPENDIX TO DEFENDANT-APPELLANT'S BRIEF

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INDEX

	PAGE
Docket Entries	1a
Complaint	5a
On Motion—Notice of Motions	10a
On Motion—Motion of Defendant Minnesota Mining and Manufacturing Company	11a
Defendant's Exhibit 1	14a
Amended Complaint	48a
On Motions—Order	56a
Opinion On Motion of Defendant Minnesota Mining and Manufacturing Company For Dismissal of Complaint, etc.	58a
On Motions—Order	66a
On Motion—Notice of Appeal	68a

	Original	Print
Proceedings in the United States Court of Appeals for the Third Circuit	63	69
Opinion, McLaughlin, J.	63	69
Judgment	86	92
Order staying issuance of mandate	87	93
Clerk's certificate (omitted in printing)	88	93
Order allowing certiorari	89	93

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

NEW JERSEY WOOD FINISHING COMPANY,
Plaintiff,
vs.
MINNESOTA MINING AND MANUFACTURING COMPANY
and
ESSEX WIRE CORP.,
Defendants.

Civil Docket No. 964-61

Docket Entries

11–21–61	Complaint filed 11-20-61.
11–21–61	Summons issued.
11–21–61	Notice of Allocation and Assignment (Newark-Augelli) filed.
12– 6–61	Summons returned served on Irvington Varnish and Insulator Co. on 11-27-61; served on Minnesota Mining & Mfg. Co., Essex Wire Corp., Insulation and Wires, Inc. on 11-30-61, filed.
12–19–61	Stipulation and order extending time of Essex Wire Corp., to answer to 2-19-62, filed 12-18-61. (Augelli). Notice mailed.
12–20–61	Stipulation and order extending time of Minnesota Mining and Mfg. Co. to answer to 1-19-62, filed 12-19-61. (Augelli) Notice mailed.
1–22–62	Stipulation and order extending time of Minnesota Mining and Manufacturing Co., and Irvington Varnish and Insulator Co., to answer to 2-19-62, filed 1-19-62 (Augelli) Notice mailed.

Docket Entries

1-24-62	Notice of Minnesota Mining and Manufacturing Company to take depositions of Harold Wetterburg, et als filed 1-23-62.
2- 7-62	Stipulation and order postponing time and place to take depositions of Harold Wetterburg, et als; extending time to answer, filed 2-6-62 (Augelli) Notice mailed.
11-13-62	Notice of call for dismissal under Gen. Rule 12, returnable 12-10-62 filed. Notice mailed.
11-27-62	Notice of dismissal as to the defendant, Irvington Varnish and Insulator Co., filed 11-26-62.
12-11-62	Hearing on call for dismissal under General Rule 12. Ordered motion denied. (Augelli) (12-10-62).
12-12-62	Plaintiff's demand for trial by jury filed 12-11-62.
12-12-62	Plaintiff's motion to compel Minnesota Mining and Manufacturing Company to produce documents, plaintiff's motion to compel Essex Wire Corp., to produce documents, notice returnable 1-14-63 and acknowledgments of service filed 12-11-62 (No brief submitted).
12-19-62	Motions of Minnesota Mining and Manufacturing Company for dismissal or for summary judgment; or in the alternative to strike portions of complaint, etc., notice returnable 1-14-63 and acknowledgments of service filed 12-18-62. (Brief submitted).
12-20-62	Notice of motion by Essex Wire Corporation for summary judgment dismissing plaintiff's complaint; deferring the time to answer plaintiff's interrogatories and motions for the production of documents; sustaining certain objections to plaintiff's interrogatories, etc.; and affidavit of service, filed 12-19-62 (Brief submitted) (ret. 1-14-63).

Docket Entries

1–24–63	Deposition of Harold Wetterberg, filed 1-23-63.
1–28–63	Stipulation and order adjourning hearings on defendants' motions for summary judgment dismissing plaintiff's complaint; etc., to 2-11-63, filed 1-25-63 (Augelli) Notice mailed.
1–29–63	Stipulation and Order extending time of defendants to answer interrogatories until ten days after entry of final order on motions of defendants for summary judgment filed 1-28-63. (Augelli) Notice mailed.
2– 8–63	Deposition of Henry K. Parsons, filed.
2–14–63	Hearing on motions of Minnesota Mining and Manufacturing Co., for dismissal or for summary judgment; or in the alternative, to strike portions of complaint, etc. Ordered motion granted in part and denied in part.
	Ordered motion of M. M. & M. Co. for dismissal continued to March 11, 1963.
	Ordered plaintiff may amend complaint within 30 days. (Augelli) (2-11-63).
2–14–63	Hearing on motion by Essex Wire Corp., for summary judgment dismissing plaintiff's complaint; deferring the time to answer plaintiff's interrogatories and motions for production of documents; sustaining certain objections to plaintiff's interrogatories. Ordered motion granted in part and denied in part.
	Ordered plaintiff may amend complaint within 30 days. (Augelli) (2-11-63).
3–13–63	Plaintiff's notice of motion to settle form or order re amended complaint, etc., returnable 3-25-63 and affidavit of service filed. (No brief).

Docket Entries

3-20-63	*Amended Complaint* and acknowledgment of service, filed 3-19-63.
3-26-63	Continued hearing on motion of Minnesota Mining and Mfg. Co. for dismissal. Decision reserved. (Augelli) (3-25-63).
3-26-63	Hearing on plaintiff's motion to settle form of order re amended complaint, etc. Order to be submitted. (Augelli) (3-25-63).
4-17-63	Order dismissing plaintiff's claim for relief against Essex Wire Corp. for violation of Section 7 of Clayton Act; granting plaintiff leave to amend complaint, etc., filed 4-15-63 (Augelli) Notice mailed.
4-19-63	Transcript of hearings held on March 25, 1963, filed 4-18-63.
4-22-63	Opinion, filed 4-19-63 (Augelli) (denying motion for dismissal, etc.)
4-22-63	Order denying defendant's motion to dismiss the complaint, or in the alternative, for a summary judgment; etc., filed 4-19-63 (Augelli) Notice mailed.
5-13-63	Certified copy of order from U. S. C. A. permitting appeal, filed.
5-17-63	Notice of appeal by defendant, Minnesota Mining and Manufacturing Co., filed 5-16-63.
5-17-63	Bond on Appeal, filed 5-16-63.
5-17-63	Copies of notice of appeal forwarded to Clerk, U. S. C. A., Lowenstein, & Spicer, Esqs., and Hannoch, Weisman, Myers, Stern & Besser, Esqs.
5-27-63	Transcript of hearings held on Feb. 11, 1963, filed 5-24-63.

Complaint

(Filed November 20, 1961)

Plaintiff brings this civil action under the Anti-Trust Laws of the United States, specifically under Sections 4, 7 and 16 of the Act of Congress of October 15, 1914 entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes", as amended and supplemented, (15 U. S. C. A. 15, 18 and 26) commonly known as the Clayton Act, and Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", (15 U. S. C. A. 1 and 2) commonly known as the Sherman Anti-Trust Act. Plaintiff complains and alleges as follows:

1. Plaintiff is a corporation organized under the laws of the State of New Jersey, having its principal place of business at Woodbridge, New Jersey. At all times herein under consideration, plaintiff was and still is engaged in the manufacture of electrical insulation products used in electric motors, transformers, cables, generators and appliances, selling and distributing its products throughout the United States by means of independent distributors.

2. All defendants are corporations which maintain offices, transact business and are found in the State of New Jersey. The defendant Minnesota Mining and Manufacturing Company (hereinafter referred to as M. M. M.), is a Delaware corporation with its principal place of business in St. Paul, Minnesota. For many years prior to 1953, M. M. M. has been a highly diversified manufacturing company, with property and facilities throughout the United States. Among its products were electrical insulation tapes of which it was the nation's leading manufacturer.

During the years 1952-1956, M. M. M. engaged in a pattern of corporate acquisitions in the electrical insulation field, extending from the manufacture and distribution of electrical insulation tape to manufacture and distribution

of other electrical insulation products. Among these acquisitions, M. M. M. obtained control of defendant Irvington Varnish and Insulator Co. (hereinafter referred to as Irvington Varnish), a New Jersey corporation, now a division of M. M. M. with manufacturing facilities at Freehold, New Jersey. Irvington Varnish at all times herein under consideration was and still is a leading manufacturer and seller of electrical insulation products, and in direct competition with plaintiff.

Additionally, in or about August, 1956, the defendant M. M. M. acquired the principal assets of the defendant Insulation and Wires, Inc., a nationwide distributor of electrical insulation products upon whom the plaintiff had continuously, primarily and successfully relied to purchase, resell and distribute plaintiff's products.

Prior to August 1956, Insulation and Wires, Inc. (hereinafter referred to as I. W. I.) had been wholly owned by the defendant, Essex Wire Corp. (hereinafter referred to as Essex Wire), a Michigan corporation. The defendant Essex Wire, at all times herein under consideration, was and still is a purchaser of a substantial volume of electrical insulation products, with much of its purchasing done from or through I. W. I.

At all times herein under consideration, I. W. I. was and still is a distributor of electrical insulation products, distributing through a national network, I. W. I. sales offices being located throughout the United States, including Newark, New Jersey; Boston, Mass.; Detroit, Michigan; St. Louis, Missouri; Houston, Texas; Los Angeles and San Francisco, California; Portland, Oregon; and Atlanta, Georgia. Until its acquisition by M. M. M., I. W. I. distributed said products for manufacturers other than a parent, subsidiary or affiliate. In 1956, I. W. I.'s total sales volume of $3,601,000 made it the third largest distributor of electrical insulation products in the United States with a share of the national market of 6% compared to the nation's largest distributor's share of 19%.

By means of its acquisitions in the electrical insulation field, M. M. M. became the largest manufacturer and distributor of electrical insulation products in the United States, and directly competitive with plaintiff.

3. Beginning in or about August, 1956 and continuing until the date of the filing of this complaint, defendants have unlawfully contracted, combined and conspired to restrain trade in the manufacture, sale and distribution of electrical insulation products, in interstate commerce, in violation of Section 1 of the Sherman Act, by integrating control over the manufacture, sale and distribution of such products in one entity.

4. For the purpose of carrying out the aforesaid unlawful contracts, combinations and conspiracies defendants have done and have continued to do, until the date of the filing of this complaint, the following unlawful acts:

(a) M. M. M. acquired the principal assets of I. W. I. from Essex Wire.

(b) M. M. M. exercises control over I. W. I. whereby I. W. I. refuses to distribute electrical insulation products manufactured by plaintiff.

(c) M. M. M. exercises control over I. W. I. whereby I. W. I. purchases for stock or re-sale, electrical insulation products from Irvington Varnish to the exclusion of products manufactured by plaintiff.

(d) M. M. M. exercises control over I. W. I. whereby I. W. I. ties the sale to customers of certain electrical insulation products manufactured by M. M. M. to the sale of other such products made by M. M. M. and its subsidiaries.

(e) M. M. M. has arranged with Essex Wire for Essex Wire to purchase its requirements of electrical insulation products from I. W. I., to the complete and systematic exclusion of competitive distributors engaged by plaintiff to sell its products.

5. By the aforesaid unlawful and continuing contracts, combinations, conspiracies and acts, defendants have attempted to monopolize trade in the manufacture, sale and distribution of electrical insulation products in interstate commerce, in violation of Section 2 of the Sherman Act.

6. By the aforesaid acquisition of I. W. I., M. M. M. has directly violated Section 7 of the Clayton Act.

7. The effect on plaintiff of the above mentioned violations of the Anti-Trust Laws has been and is to disrupt plaintiff's pattern of manufacture, sale and distribution, and to foreclose to plaintiff, a substantial portion of the national market for electrical insulation products and to cause plaintiff to lose the business and goodwill of numerous customers, whereby plaintiff has suffered and continues to suffer injury and damage to its business and property.

8. Plaintiff, throughout the entire period during which the aforesaid activities have been carried on by defendants has remained ready and willing to manufacture and sell in the manner required by competition.

9. In July, 1961, in Docket No. 7973, *In the Matter of Minnesota Mining and Manufacturing Company,* The Federal Trade Commission entered into a "consent order to divest and to cease and desist" with M. M. M. based upon a complaint against said defendant made by the F. T. C. in June, 1960; the terms of which order require M. M. M. to divest itself of all assets of I. W. I. as to restore I. W. I. as a competitive entity, on or prior to January 1, 1962.

10. Unless a temporary restraining order is issued by the court, defendants will continue to act in the aforesaid unlawful manner, to plaintiff's detriment. If such a temporory restraining order is issued, no harm will result to defendants, as the F. T. C. as aforesaid, has already ordered M. M. M. to restore I. W. I. as a competitive entity, with which order M. M. M. has not yet complied.

WHEREFORE, plaintiff demands:

1. There be issued a temporary restraining order and preliminary injunction of the court directing defendants to terminate their unlawful contracts, combinations and conspiracies, and unlawful acts, and after trial, said injunction be made permanent.

2. A decree be issued by this court ascertaining damages suffered by plaintiff by reason of defendants' unlawful acts above complained of and awarding a judgment in favor of plaintiff and against defendants in the amount of thrice the damages.

3. That the plaintiff be awarded the costs of this action and defendants be directed to pay them.

4. That plaintiff be awarded attorneys' fees in an amount determined by this court to be reasonable and that defendants be directed to pay such amount.

5. That the plaintiff have such further relief as the court may direct.

HANNOCH, WEISMAN, MYERS, STERN & BESSER
Attorneys for Plaintiff

By ALBERT G. BESSER

Albert G. Besser
For the Firm

On Motion
Notice of Motions

(Filed December 18, 1962.)

To:

HANNOCH, WEISMAN, MYERS, STERN AND BESSER, ESQS.
Attorneys for Plaintiff
744 Broad Street
Newark 2, New Jersey

LOWENSTEIN & SPICER, ESQS.
Attorneys for Defendant,
Essex Wire Corporation
744 Broad Street
Newark 2, New Jersey

TAKE NOTICE That on Monday, January 14, 1963, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard, we shall move the annexed Motions before the Honorable Anthony T. Augelli, Judge at the United States District Court for the District of New Jersey, or such other judge thereof as may then be sitting to hear motions in this matter, at the appropriate court room in the Federal Building, Newark, New Jersey; and

TAKE FURTHER NOTICE That said Motions may be supported, in part, by the depositions in this suit, taken on behalf of this defendant, of Henry K. Parsons, vice president of plaintiff, and Harold Wetterberg, president thereof, together with the exhibits produced by said witnesses on said examinations and marked for identification in the course thereof.

Dated: December 14, 1962.

CHARLES C. TRELEASE
(Charles C. Trelease)
Attorney for Defendant,
Minnesota Mining and Manufacturing Company
744 Broad Street
Newark 2, New Jersey

Motion of Defendant Minnesota Mining and Manufacturing Company

Of Counsel:

SIDNEY P. HOWELL, JR.
EDWIN E. MCAMIS
and
REGAN-GOLDFARB POWELL & QUINN
of New York City, N. Y.

THOMAS J. LYONS
of St. Paul, Minnesota

On Motion

Motion of Defendant Minnesota Mining and Manufacturing Company

(Filed December 18, 1962.)

Defendant, Minnesota Mining and Manufacturing Company, hereby moves as follows:

1. That the complaint herein be dismissed pursuant to Rule 12(b) for failure to state a claim upon which relief can be granted or that summary judgment in favor of this defendant against the plaintiff be entered pursuant to Rule 56(b), in that, in either case as appears by the complaint, such cause of action as plaintiff may have had against this defendant accrued more than four years before commencement of this action and, accordingly, this action was and is barred by the applicable statute of limitations; to wit, 15 U. S. C. A., Sec. 15(b), 69 Stat. 283, being Section 4(b) of the Clayton Act, as amended;

Motion of Defendant Minnesota Mining and Manufacturing Company

2. That, in the alternative and for the reason aforesaid, each and every allegation or reference to Section 7 of the amended Clayton Act presently contained in the complaint and forming any part of plaintiff's claim herein be stricken therefrom, this defendant hereby reserving the right to answer the complaint herein as so modified upon the merits;

3. That paragraph 9 of the complaint herein be stricken pursuant to Rule 12(f) as immaterial, impertinent and prejudicial, the allegations therein being to a proceeding not encompassed by the provisions of 15 U. S. C. A., Sec. 16, being Section 5 of the Clayton Act, as amended, and the consent order in said proceeding, referred to in said paragraph 9, in any case, being within the proviso of said section; to wit, a consent judgment entered before any testimony had been taken;

4. That, this defendant's time to answer or otherwise move with respect to the Interrogatories directed to this defendant which were served by plaintiff upon this defendant on October 23, 1962, during the course of this defendant's taking of the depositions of members of plaintiff's management be extended for a reasonable time following the completion of the discovery on its part now in progress, or, at all events, for a reasonable time following the Court's ruling on the motions for dismissal and summary judgment herein;

5. That the hearing on plaintiff's motion to compel production of documents by this defendant, noticed for January 14, next, the papers in which were served on this defendant on December 10, be continued to a motion day following the completion of the discovery proceedings on this defendant's part now in progress, or, at all events, follow-

ing the Court's ruling on the motions for dismissal and summary judgment herein.

CHARLES C. TRELEASE
(Charles C. Trelease)
Attorney for Defendant,
Minnesota Mining and Manufacturing Company
744 Broad Street
Newark 2, New Jersey

Of Counsel:

SIDNEY P. HOWELL, JR.
EDWIN E. MCAMIS
and
REGAN GOLDFARB POWELL & QUINN
of New York City, N. Y.

THOMAS J. LYONS
of St. Paul, Minnesota

Defendant's Exhibit 1

Filed February 11, 1963

[EMBLEM]

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

I, Joseph W. Shea, Secretary of the Federal Trade Commission, and official custodian of its records, do hereby certify that attached is a full, true, and conmplete copy of:

> Complaint, issued June 24, 1960; agreement containing consent order to divest and to cease and desist, with appendix, signed July 19, 1961; initial decision by Hearing Examiner Edgar A. Buttle, filed July 20, 1961; and decision of the Commission and order to file report of compliance, issued August 24, 1961; all in Federal Trade Commission Docket 7973, in the matter of Minnesota Mining and Manufacturing Company.

(SEAL)

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the Federal Trade Commission to be affixed this 5th day of February, A.D. 1963, at Washington, D.C.

JOSEPH W. SHEA
Secretary.

Defendant's Exhibit 1

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

Docket No. 7973

IN THE MATTER OF:

MINNESOTA MINING & MANUFACTURING COMPANY

COMPLAINT

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF MINNESOTA MINING AND MANUFACTURING COMPANY, a corporation.	Docket No. 7973

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described has violated and is now violating the provisions of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended, hereby issues its complaint pursuant to Section 11 of the aforesaid Act (U.S.C. Title 15, Sec. 21), charging as follows:

PARAGRAPH ONE: Respondent Minnesota Mining and Manufacturing Company, hereinafter referred to as Minnesota Mining, is a corporation organized and existing under

Defendant's Exhibit 1

the laws of the State of Delaware with its principal office and place of business located at 900 Bush Street, St. Paul 6, Minnesota.

For a number of years beginning prior to 1953 Minnesota Mining has been a highly diversified company manufacturing and selling a number of product lines and segments thereof including the following: coated abrasives and related products; tapes including cellophane, masking, industrial and electrical; sound-recording magnetic tape; adhesives and coatings; roofing granules; graphic products including reflective, printing and duplicating products; color pigments; sulfuric acid; crushed stone, sand and ready mixed cement; and gummed paper, cloth tapes, and gummed labels. It has been also engaged in leasing and servicing signs for highway advertising. Since 1953 Minnesota Mining has begun the manufacture and sale of reinforced plastics, contact bond adhesives, heat sealable polyester film and certain types of chemical products.

It is the largest manufacturer of magnetic tapes, electrical insulation tapes, pressure sensitive plastic backing including cellophane tapes, and is the largest or one of the largest manufacturers of coated abrasive products, roofing granules, graphic products and highway advertising material.

Minnesota Mining has a world-wide business with properties and facilities throughout the United States and in many foreign countries. It is and has been engaged in the manufacture, sale, and distribution of its products in commerce, as "commerce" is defined in the Clayton Act, throughout the several States of the United States and in the District of Columbia.

Minnesota Mining has branch offices and warehouses in nineteen cities throughout the United States through which primary distribution is made to wholesalers and distributors in a wide-variety of trades. Sales are also made direct to large industrial and other consumers. During the early 1950's it sold its electrical insulation tape through many

distributors and to original equipment manufacturers throughout the United States with the exception of the Eastern Seaboard where its electrical insulation tape was sold directly to consumers.

Minnesota Mining's net sales increased from $108,246,000 in 1948 to $185,242,000 in 1952. During this five year period its net income increased from $13,235,000 to $16,090,000, and its total assets increased from $88,902,000 to $153,275,000. From 1952 to 1956 Minnesota Mining's net sales increased from $185,242,000 to $330,808,000, its net income increased from $16,090,000 to $38,724,000, and its total assets increased from $153,275,000 to $255,084,000.

During the five year period 1952 to 1956 a substantial portion of Minnesota Mining's growth was achieved by 14 acquisitions, 12 domestic and two foreign. Nine of the 12 domestic acquisitions included all the assets of the companies; one was the acquisition of patents; one was an acquisition of a chemical division belonging to another company; and one an acquisition of a research and development partnership. The acquisitions fell into six categories, all of which were related to the existing Minnesota Mining operations. The product groups with the number of acquisitions in each are as follows:

Electrical insulation (6 domestic and 2 foreign companies)	8 acquisitions
Adhesives	1 acquisition
Reinforced plastics	2 acquisitions
Chemicals, including resins	1 acquisition
Paper products (including electrical insulation paper)	1 acquisition
Video recording equipment	1 acquisition

The electrical insulation products of the companies acquired in the electrical insulation industry were complementary to the electrical insulation tape manufactured and sold by Minnesota Mining. The principal electrical in-

sulation product lines acquired were varnished fabrics and paper, manufactured mica, industrial laminates, insulating liquid varnish, extruded plastic tubing, flexible treated tubing and sleeving, and steatite.

In June 1953, Minnesota Mining acquired American Lava Corporation. American Lava Corporation was engaged in the manufacture and sale of steatite ceramic insulation products and other ceramic products throughout the United States. These products were used principally as electrical insulation in radio and television components and household appliances, and as components for textile machinery and processes. At the time of its acquisition American Lava Corporation was the largest producer of steatite. In 1952 American Lava Corporation's net sales were $7,515,000 and its total sales of steatite were $5,204,000. Its sales of steatite for electrical insulation were $3,383,000, and accounted for approximately one third of the total sales of steatite in the electrical insulation industry. Most of its sales were made directly to original equipment manufacturers.

In July 1953, Minnesota Mining acquired Irvington Varnish & Insulator Company, hereinafter referred to as Irvington. Irvington was engaged in the manufacture and sale of electrical insulation (varnished fabrics and paper, flexible treated tubing and sleeving, extruded plastic tubing, and liquid insulation varnish) and certain other products throughout the United States. Prior to its acquisition, Irvington was the largest producer and seller of varnished fabrics and paper, and of extruded plastic tubing for electrical insulation. In 1952 Irvington accounted for approximately two fifths of the total industry sales of varnished fabrics and paper and for approximately one third of the total industry sales of extruded plastic tubing. Its net sales in 1952 were $13,540,000, of which approximately 70 percent was in electrical insulation products. Its sales of electrical insulation products were made to

Defendant's Exhibit 1

original equipment manufacturers and to electrical insulation distributors.

In November 1955, Minnesota Mining acquired Mica Insulator Company. Mica Insulator Company was engaged in the manufacture and sale of manufactured mica products, industrial laminated sheets, varnished fabrics and paper for use as electrical insulation, and certain other products throughout the United States. In 1955, Mica Insulator Company was the second largest producer of mica insulation, accounting for approximately 20 percent of total industry sales. In varnished fabrics and paper it was the seventh largest producer with approximately 5 percent of total industry sales in 1955. Its net sales of electrical insulation products in 1955 were $5,672,000. Its sales of electrical insulation products were made to original equipment manufacturers and to electrical insulation distributors.

At the time Mica Insulator Company was acquired by Minnesota Mining it owned 20 percent of the stock of Micanite of Canada, Ltd. and 33⅓ percent of the stock of Samica Corporation. After Mica Insulator Company was acquired, Minnesota Mining purchased the remaining stock of said companies. Samica Corporation was engaged in the manufacture and sale of reconstituted mica sheets used for electrical insulation throughout the United States. The manufacture of reconstituted mica sheets was a relatively new process in 1954, with Samica Corporation being one of the first companies to produce this new product. Sales of mica sheets in 1954 by Samica Corporation were $124,000.

By 1959, Minnesota Mining's net sales had increased to $446,580,000, its net income had increased to $60,262,000, and its total assets had increased to $351,838,000.

PARAGRAPH TWO: In March 1956, Minnesota Mining acquired all of the assets of Prehler Brothers, Incorporated and Prehler Electrical Insulation Company which were

operating as Prehler Electrical Insulation Company, hereinafter referred to as Prehler. Prehler was a corporation organized under the laws of the State of Illinois.

Prehler was engaged in the purchase, sale and distribution of electrical insulation products and other products in commerce, as "commerce" is defined in the Clayton Act. Prehler's principal sales office was located in Chicago, Illinois, and its other sales offices were in the following cities: Cleveland and Dayton, Ohio; Detroit, Michigan; Minneapolis and St. Paul, Minnesota; and Milwaukee, Wisconsin. Prehler sold and distributed electrical insulation products throughout the various sections of eight states, including Minnesota, Wisconsin, Iowa, Illinois, Michigan, Indiana, Ohio and Kentucky and in sections of three other adjacent states.

Prehler purchased substantial amounts of electrical insulation products from Minnesota Mining and other electrical insulation manufacturers. Electrical insulation products sold by Prehler included varnished fabrics and paper, manufactured mica, industrial laminates, insulating liquid varnish, electrical insulation tape, flexible tubing and sleeving and extruded plastic tubing. Its sales were made to original equipment manufacturers and to motor repair and rewind shops in competition with others including Insulation and Wires, Inc.

Prehler was the second largest distributor of electrical insulation products in the United States and in the sections of the country in which it sold electrical insulation products. In 1956 its total sales of all electrical insulation products were $6,471,000 and its total assets amounted to approximately $1,500,000.

PARAGRAPH THREE: In August 1956, Minnesota Mining acquired the principal assets of Insulation and Wires, Inc., hereinafter referred to as IWI, a wholly-owned subsidiary of Essex Wire Corporation. IWI consisted of (1) Insulation and Wires, a Missouri corporation, (2) Insulation and

Wires, a Georgia corporation, and (3) Insulation and Wires, a Division of the Essex Corporation, a Michigan corporation.

IWI was engaged in the purchase, sale and distribution of electrical insulation products and other products in commerce, as "commerce" is defined in the Clayton Act. Its principal office was located at Ft. Wayne, Indiana, and its nine sales offices were located throughout the United States, namely: Newark, New Jersey; Boston, Massachusetts; Detroit, Michigan; St. Louis, Missouri; Houston, Texas; Los Angeles, and San Francisco, California; Portland, Oregon and Atlanta, Georgia.

A substantial amount of IWI's total purchases were electrical insulation products which were purchased from electrical insulation manufacturers. Electrical insulation products sold by IWI included varnished fabrics and paper, manufactured mica, industrial laminates, insulating liquid varnish, electrical insulation tape, flexible tubing and sleeving and extruded plastic tubing. Its principal sales were made to motor repair and rewind shops and original equipment manufacturers in competition with others including Prehler.

IWI was the third largest distributor of electrical insulation products in the United States and one of the few distributors who sold electrical insulation on a nation-wide basis. In 1956, its total sales of all electrical insulation products were $6,126,000, and its total assets amounted to approximately $1,772,000. Its sales of electrical insulation products in the areas in which Prehler did business were over $1,000,000.

PARAGRAPH FOUR: Electrical insulation products are used in electric motors, transformers, generators, electric cables, appliances, and other electrical and electronic equipment. Each of the electrical insulation product lines have approximately 15 to 20 manufacturers and most of these manufacturers are small companies who concentrate their efforts in one product line. Some manufacturers use most

of their electrical insulation products in their own integrated operation. Practically all electrical insulation manufacturers sell electrical insulation products to original equipment manufacturers and to electrical insulation distributors. The electrical insulation distributors in turn sell to original equipment manufacturers and to other classes of customers including motor repair and rewind shops.

Prior to its acquisitions in the electrical insulation industry, Minnesota Mining was the largest producer of electrical insulation tape. It was the first company to develop and sell this product on a commercial basis. As other companies entered this market, Minnesota Mining's market position declined to approximately 84 percent in 1952 and 66 percent in 1958, with sales of $5,112,000 and $4,912,000 respectively.

Minnesota Mining's acquisitions of electrical insulation manufacturers between 1952 and 1956 brought under its control substantial shares of major electrical insulation product lines and made it the largest company in the United States engaged in the manufacture and sale of electrical insulation products to original equipment manufacturers and electrical insulation distributors. These acquisitions included:

(1) In 1955, Irvington and Mica Insulator Company together accounted for approximately 33 percent of the varnished fabrics and paper market. In 1958, their combined sales were approximately 19 percent of the industry's total sales of varnished fabrics and paper and they ranked as the second largest seller.

(2) Irvington was the largest seller of extruded plastic tubing at the time of its acquisition and has continued to hold this market position, accounting for approximately 33 percent of the industry's total sales of extruded plastic tubing.

Defendant's Exhibit 1

(3) Irvington's sales of flexible treated tubing and sleeving has increased from approximately 7 percent of the industry's total sales in 1952 to approximately 11 percent in 1958.

(4) Mica Insulator Company has ranked as the second largest company in the sale of manufactured mica with approximately 20 per cent of total industry sales of this product since 1955.

(5) American Lava Corporation has ranked as the largest company in the sales of steatite, with approximately 33 percent of total industry sales of steatite in 1952 and approximately 28 percent of said sales in 1958.

Minnesota Mining's total net sales of all electrical insulation products were $44,497,000 in 1956 and $40,237,000 in 1958. Its domestic sales of varnished fabrics and paper, manufactured mica, industrial laminates, insulating liquid varnish, electrical insulation tape, extruded plastic tubing, flexible treated tubing and sleeving and steatite were $21,687,000 in 1956 and $15,709,000 in 1958.

Prior to their acquisitions, Prehler and IWI were two of the three largest electrical insulation distributors competing with Minnesota Mining in the sale of electrical insulation products to original equipment manufacturers and others in various sections of the country. Prehler and IWI accounted for approximately 15 percent and 14 percent, respectively, of the total sales of all electrical insulation products sold through electrical insulation distributors in 1956.

With these acquisitions, Minnesota Mining became the largest distributor of electrical insulation products and has continued to hold this market position, accounting for approximately 29 percent of the total sales of all electrical insulation products sold and distributed by electrical insu-

lation distributors in the United States. During the same period of time the sales of the next largest distributor of electrical insulation products declined from approximately 24 percent to approximately 20 percent of said total sales. In 1958, Minnesota Mining's sales of all electrical insulation products through its acquired distributors mounted to $10,665,000.

The acquisitions of Prehler and IWI made Minnesota Mining the second largest distributor of seven of the electrical insulation product lines which it manufactured, accounting for approximately 18 percent of the total sales of said products. In 1958, Minnesota Mining's sales of said seven electrical insulation products through its acquired electrical insulation distributors had increased to about 21 percent of the total sales of said products by electrical insulation distributors, while sales of said seven products by the largest electrical insulation distributor declined to less than 21 percent. In 1958, Minnesota Mining's sales of said seven electrical insulation products through its acquired distributors were $4,820,000.

In 1956, Prehler accounted for approximately 27 percent of the sales of the aforesaid seven electrical insulation products sold by electrical insulation distributors in the sections of the country in which it sold electrical insulation products. In 1958, Prehler's sales of these products accounted for approximately 32 percent of the total sales of these products in said sections of the country.

Prior to the acquisitions of Prehler and IWI a number of electrical insulation manufacturers were suppliers of electrical insulation products to Prehler and IWI. Since the acquisitions many of these suppliers have been discontinued.

Prior to the acquisitions of Prehler and IWI, a number of electrical insulation distributors purchased electrical insulation products for resale from Minnesota Mining and

from the manufacturers of electrical insulation products who were acquired by Minnesota Mining. Since said acquisitions many of these electrical insulation distributors have been foreclosed from purchasing electrical insulation products from Minnesota Mining and its acquired companies.

PARAGRAPH FIVE: The effect of the aforesaid acquisitions by Minnesota Mining of Prehler and IWI, and of each of them, may be substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution and sale of electric insulation products, individually and collectively, in various sections of the country within the meaning of Section 7 of the Clayton Act as amended.

The aforesaid effects include the actual or potential lessening of competition and a tendency to create a monopoly in the following ways, among others:

1. Minnesota Mining, as the largest producer of electrical insulation tape, and with its acquisitions of leading manufacturers of other electrical insulation products, by acquiring two of the three largest distributors of electrical insulation products in the United States, has extended and integrated its business in such a manner as to substantially increase its position in the manufacture, sale and distribution of electrical insulation products; and it may exercise the inherent powers of its acquired position to substantially lessen competition or tend to create a monopoly in the manufacture, sale and distribution of electrical insulation products.

2. Manufacturers of electrical insulation products have been foreclosed from a substantial share of the markets for said products.

3. Competition has been eliminated between Prehler and IWI in the distribution and sale of elec-

trical insulation products in the sections of the country in which they were competing, and potential competition has been eliminated between said companies throughout the United States.

4. Actual and potential competition has been eliminated between Minnesota Mining and the two acquired distributors.

5. As a leading manufacturer and distributor of electrical insulation products Minnesota Mining has acquired a position whereby it may:

(a) Manipulate prices or use other means to lessen competition or tend to create a monopoly; and

(b) Concentrate the full impact of its sales, promotional and merchandising experience and ability on one of its electrical insulation products, or on one selected section of the country.

6. Concentration of the manufacture, sale and distribution of electrical insulation products may be increased.

PARAGRAPH SIX: The foregoing acquisitions, acts and practices of respondent, as hereinbefore alleged and set forth, constitute a violation of Section 7 of the Clayton Act as amended and approved December 29, 1950.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 24th day of June A. D., 1960, issues its complaint against said respondent.

Defendant's Exhibit 1

NOTICE

Notice is hereby given to the respondent hereinbefore named that the 12th day of September, A. D., 1960, at 10 o'clock is hereby fixed as the time and St. Paul, Minnesota, as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

If respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer respondent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Defendant's Exhibit 1

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 24th day of June, 1960.

By the Commission.

SEAL

ROBERT M. PARISH /s/

Robert M. Parish,
Secretary

Defendant's Exhibit 1

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Federal Trade Commission Services Received July 19, 1961

Hearing Examiners

In the Matter of MINNESOTA MINING AND MANUFACTURING COMPANY, a corporation.	Docket No. 7973

AGREEMENT CONTAINING CONSENT ORDER TO DIVEST AND TO CEASE AND DESIST

The agreement herein, by and between Minnesota Mining and Manufacturing Company, a corporation, respondent in Docket No. 7973, hereinafter sometimes referred to as Minnesota Mining, by its duly authorized officers and attorneys, and by counsel supporting complaint, subject to the approval of the Bureau of Restraint of Trade, Federal Trade Commission, is entered into in accordance with Section 3.25 of the Rules of Practice and Procedure of the Federal Trade Commission dated March, 1960. In accordance therewith the parties hereby agree that:

1. Respondent Minnesota Mining and Manufacturing Company is a corporation doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 900 Bush Avenue, St. Paul 6, Minnesota.

2. Pursuant to the provisions of Section 7 of the amended Clayton Act, the Federal Trade Commission on June 24, 1960 issued its complaint in this proceeding against respondent and a true copy was thereafter duly served on respondent.

Defendant's Exhibit 1

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties. The parties agree that it is in the public interest that the allegations of the complaint charging that respondent's acquisition of Prehler Electrical Insulation Company violated Section 7 of the amended Clayton Act be dismissed for the reasons set forth in the attached Appendix A, which is made a part of this agreement.

5. Respondent waives:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights they may have to challenge or contest the validity of the order entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

9. For the purposes of this agreement, electrical insulation products shall consist of the following sixteen products and any other product, which may be introduced as a replacement, substitution, or improvement on said sixteen

products, which are sold for use by manufacturers of electrical appliances, electrical machinery, electronics apparatus, communication and power cable, and in the repair of motors, generators and transformers.

(1) Varnished fabrics and paper.

(2) Manufactured electrical mica.

(3) Coated electrical sleeving (formerly known as flexible treated tubing and saturated sleeving).

(4) Industrial laminates.

(5) Insulating liquid varnish.

(6) Electrical insulation tape (pressure sensitive).

(7) Extruded plastic tubing.

(8) Steatite.

(9) Polymeric films such as cellulose acetate, polyvinyl chloride, polypropylene, polyethylene, polyester, fluorinated ethylene propylene, and polytetrafluorethylene.

(10) Vulcanized fibre, fish paper, asbestos paper, kraft paper (including condensor tissue), rag paper, and transformer board.

(11) Untreated cotton and glass tapes.

(12) Encapsulating resins and molding compounds—polyester, apoxy, phanellie, alkyds, silicone, waxes, and asphaltic compounds.

(13) Wire enamels.

(14) Natural, butyl, buna, neoprene, and silicone rubber.

(15) Liquid dielectrics for distribution transformers, power transformers, circuit breakers, specialty transformers, and capacitors.

(16) Hardwood slot sticks.

Defendant's Exhibit 1

For the purposes of this agreement an electrical insulation distributor is a firm which purchases a line of electrical insulation products, from manufacturers other than a parent or subsidiary, for stock and resale.

10. The following order to divest and to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

ORDER

I.

IT IS ORDERED that respondent Minnesota Mining and Manufacturing Company, its subsidiaries, officers, directors, agents, representatives and employees, shall:

1. On or before January 1, 1962, divest itself absolutely, in good faith, as a unit by sale to a purchaser approved by the Commission of all assets, properties, rights and privileges, including but not limited to all trade-marks, trade names, customer lists, contracts, business and good will acquired by respondent as a result of its acquisition of all of the assets of Insulation and Wires division of the Essex Wire Corporation, and all of the assets of Insulation and Wires Incorporated, a Missouri corporation, and all of the assets of Insulation and Wires Incorporated, a Georgia corporation (hereinafter collectively referred to as Insulation and Wires and presently operated as a division of respondent), together with the additions and equipment of whatever description that is presently utilized by respondent in its Insulation and Wires division, in such manner as to restore Insulation and Wires as a competitive entity in substantially the same competitive standing it formerly

had in the sale and distribution of electrical equipment and electrical insulation products at the time of the acquisition.

2. For a period of five (5) years from the date of divestiture, make available to said purchaser all of the electrical insulation products manufactured by respondent and sold by it to any electrical insulation distributors on the same terms and at the same prices as such products are sold by it to such other distributors.

3. Transfer to said purchaser all sales employees who are presently employed by respondent in its Insulation and Wires division.

II.

IT IS FURTHER ORDERED that in the divestiture of Insulation and Wires by respondent none of the said assets, properties, rights and privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to anyone, who at the time of the divestiture, is an officer, director, employee, or agent of, or otherwise directly or indirecly connected with or under the control of, respondent or any of respondent's subsidiaries or affiliated companies.

III.

IT IS FURTHER ORDERED that for a period of five (5) years from the date of this order respondent shall continue in good faith to operate its subsidiary Prehler Electrical Insulation Company as an electrical insulation distributor and shall cause said Company to purchase not less than 22% of its total annual purchases of electrical insulation products from suppliers other than respondent or its subsidiaries.

IV.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date of this order respondent shall cease and desist from acquiring, directly or indirectly, through

subsidiaries or otherwise, the assets, stock, or any equity in any electrical insulation distributor in the United States.

V.

IT IS FURTHER ORDERED that, except for the restrictions set forth in Paragraph III of this order, the allegations of the complaint charging that respondent's acquisition of Prehler Electrical Insulation Company violated Section 7 of the amended Clayton Act be dismissed.

Signed this 19th day of July, A. D., 1961.

MINNESOTA MINING AND
MANUFACTURING COMPANY,
a corporation.

By ROBERT L. WESTBEE,
Robert L. Westbee,
Vice President.
900 Bush Avenue,
St. Paul 6, Minnesota.

CONNOLLY, TUCKER POST & LYONS,
Connolly, Tucker Post & Lyons,
Attorneys for Respondent.

By ROBERT H. TUCKER,
Robert H. Tucker,

J. WALLACE ADAIR,
J. Wallace Adair,
Counsel Supporting the Complaint.

APPROVED:

JOSEPH E. SHEEHY,
Joseph E. Sheehy,
Director,
Bureau of Restraint
of Trade.

Defendant's Exhibit 1

Federal Trade Commission
Received
Jul 19, 1961
Hearing Examiners

APPENDIX A TO AGREEMENT CONTAINING CONSENT ORDER TO DIVEST AND TO CEASE AND DESIST IN DOCKET 7973

The complaint in this matter charged Minnesota Mining and Manufacturing Company (hereinafter referred to as Minnesota Mining), a manufacturer of a number of varied product lines including certain electrical insulation products, with violations of Section 7 of the amended Clayton Act in connection with its acquisitions of the electrical insulation distributors—Prehler Electrical Insulation Company (hereinafter referred to as Prehler), acquired March 1956, and Insulation and Wires (hereinafter referred to as IWI), acquired August 1956. At the time of these acquisitions Minnesota Mining was engaged in the manufacture of certain electrical insulation products which it sold to electrical insulation distributors and others. Prehler was engaged in the purchase and resale of electrical insulation products principally to original equipment manufacturers in the 5-state area of Illinois, Indiana, Wisconsin, Michigan and Ohio. IWI was engaged in the purchase and resale of electrical insulation products throughout the United States principally to motor repair and rewind shops and to original equipment manufacturers.

This Consent Order will require the complete divestiture by Minnesota Mining of all the assets of IWI. Therefore any actual or potential competition between Prehler and IWI and between Minnesota Mining and IWI which was eliminated by the acquisition of IWI will be restored. The Consent Order also requires that Minnesota Mining, for a period of five (5) years, will make available to IWI all electrical insulation products manufactured and sold by it to any electrical insulation distributor. Thus the purchaser of IWI will be guaranteed a source of supply of these products.

Prior to the acquisition of Prehler by Minnesota Mining, Prehler had been Minnesota Mining's primary source of

distribution of electrical insulation products to original equipment manufacturers in Prehler's trade area. This relationship began in 1932 when Minnesota Mining first entered the electrical insulation business with pressure-sensitive electrical insulation tape. Since that time Minnesota Mining has developed or acquired a number of electrical insulation products which it has made available to Prehler. Minnesota Mining has had a number of technical salesmen covering the Prehler trade area calling on original equipment manufacturers. These Minnesota Mining salesmen cooperated with and augmented the effectiveness of the Prehler organization. Sales developed by this cooperation were credited to Prehler or other Minnesota Mining electrical insulation distributors in accordance with the desire of the original equipment manufacturer. An exception was made with a limited number of large accounts such as General Electric, Westinghouse, Allis-Chalmers and Western Electric. The Prehler sales organizations did not call on these accounts and sales to these accounts were made direct by Minnesota Mining. Among the reasons for these direct sales were:

1. The above corporations purchased from a central buying location.

2. Many of the items were so-called specification products or non-standard sizes which would not normally be stocked by a distributor.

3. They required closer technical help than could be provided by the distributor and looked directly to Minnesota Mining for this assistance.

4. Many of the products sold were developed as a result of cooperative effort between the laboratories of these companies and the laboratory of Minnesota Mining.

At the time of acquisition substantially all of the stock in Prehler was owned by Mr. Henry Prehler. Mr. Prehler,

who has since died, had been in failing health for several years and desired to dispose of the Prehler Company in order to conserve his estate.

Since the acquisition of Prehler it has been operated in substantially the same manner as had been the practice prior to the acquisition. Prehler had 16 salesmen prior to the acquisition and presently has 16 salesmen. Its territorial coverage, its product lines, and its customers are substantially the same as at the time of acquisition. It maintains the same headquarters and branch offices.

The complaint is in error relative to the market position of Prehler, IWI and other electrical insulation distributors prior and subsequent to Prehler's acquisition. These figures were furnished as a result of a misinterpretation of certain questions in a Federal Trade Commission questionnaire. The figures as alleged in the complaint and the correct figures as developed by a comprehensive FTC survey are set forth as follows:

	Date	*Complaint*	*Corrected*
Prehler's sales of all electrical insulation products	1956	$ 6,471,000	$ 5,819,000
Prehler's share of the national market for all electrical insulation products	1956	15%	12%
	1958	—	10%
Prehler's market share in its trade area of the 7 electrical insulation products of which Minnesota Mining is a manufacturer	1956	27%	21%
	1958	32%	20%
IWI's national sales of all electrical insulation products	1956	$ 6,126,000	$ 3,601,000
IWI's sales of all electrical insulation products in the Prehler trade area	1956	$ 1,000,000	$ 500,000

Defendant's Exhibit 1

	Date	Complaint	Corrected
IWI's share of the national market for all electrical insulation products	1956	14%	6%
	1958	—	5%
Largest competing electrical insulation distributor's national market share for all electrical insulation products	1956	24%	19%
	1958	20%	16%
Combined national market share of Prehler and IWI for the 7 electrical insulation products of which Minnesota Mining is a manufacturer	1956	18%	16%
	1958	21%	14%
National market share of the largest competing electrical insulation distributor of the 7 electrical insulation products of which Minnesota Mining is a manufacturer	1958	21%	16%
Combined national sales by IWI and Prehler of the 7 electrical insulation products of which Minnesota Mining is a manufacturer	1958	$ 4,820,000	$ 3,983,000
Combined national sales by IWI and Prehler of all electrical insulation products	1958	$10,665,000	$ 6,358,000*

In order to show the relationship of the acquisitions of Prehler and IWI to Minnesota Mining's manufacturing operations, the complaint sets forth sales and market positions on certain electrical insulation products. The figures relative to Minnesota Mining's share of the electrical insulation manufacturers' market and those of its Irvington division and its Mica Insulator division were incorrect. As

the following table shows, the market position of these acquired manufacturers declined.

	Date	Complaint	Corrected
Irvington's and Mica Insulator's combined national share for varnished fabric and paper	1955	33%	35%
	1958	19%	22%
Irvington's national market share for extruded plastic tubing	1956	33%	33%
	1958	33%	30%
Irvington's national market share for flexible treated tubing and sleeving	1952	7%	6%
	1958	11%	5%
Minnesota Mining's sales of all electrical insulation products	1956	$44,497,000	$33,463,000
	1958	40,237,000	24,313,000
Share of national market	1956		11.9%
	1958		10.2%
Minnesota Mining's sales of eight electrical insulation products	1956	$21,687,000	$20,740,000
	1958	15,709,000	14,669,000
Share of national market	1956		15.2%
	1958		13.4%

* Prehler's sales and market positions shown in this table do not include the sales of electrical insulation products made by respondent's Mica Insulator division which were billed through Prehler in 1958.

In the Prehler trade area Minnesota Mining's share of the total market for the eight electrical insulation products showed a substantial decline of approximately 20% from 1956 to 1958.

	Year	Market Share
Minnesota Mining's market share of eight electrical insulation products in the Prehler trade area	1956	16%
	1958	13%

Defendant's Exhibit 1

Historically Minnesota Mining has had a substantial share of Prehler's electrical insulation business. At the time of the acquisition of Prehler, Minnesota Mining had approximately 78 percent of Prehler's electrical insulation business. Other suppliers accounted for 22 percent of the electrical insulation products which Prehler distributed. Paragraph III of the Consent Order will assure this same percentage for five years for suppliers other than Minnesota Mining. Further, as developed by the FTC survery, there are approximately 38 electrical insulation distributors competing in the Prehler trade area and it is believed that a manufacturer of electrical insulation products can readily find adequate distribution within this area.

Based on investigation since the issuance of the complaint, it appears that no electrical insulation distributor in the Prehler trade area has discontinued business since the date of the acquisition of Prehler. It further appears that at least four new electrical insulation distributors have been established in this trade area since this acquisition.

Most of the testimony which counsel supporting the complaint would rely on to prove the requisite effects at the distributor level of competition would be testimony from electrical insulation distributors outside the Prehler area and would deal primarily with the effects of the IWI acquisition rather than the Prehler acquisition. The requisite adverse effects with regard to the Prehler acquisition cannot be satisfactorily proved statistically or through competitors.

After due consideration of all of the evidence which might be offered in this case and the provisions in the Consent Order assuring that other electrical insulation suppliers shall continue to enjoy the same percentage of Prehler's business as was enjoyed in 1956, it is respectfully submitted that this consent order is in the public interest and should be issued by the Commission.

Defendant's Exhibit 1

Federal Trade Commission
Received
Jul 20, 1961
Records Serve
Secretary J. W. S.

Filed: July 20, 1961

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF MINNESOTA MINING AND MANUFACTURING COMPANY, a corporation.	Docket No. 7973

INITIAL DECISION

Edgar A. Buttle, Hearing Examiner.
J. WALLACE ADAIR, for the Commission.
CONNOLLY, TUCKER, POST & LYONS,
St. Paul, Minnesota, for the
respondent.

On June 24, 1960, the Federal Trade Commission issued its complaint against the above-named respondent charging it with violating the provisions of section 7 of the Clayton Act, as amended. On July 19, 1961, the respondent and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist and to divest in accordance with section 3.25(a) of the Rules of Practice and Procedure of the Commission.

Under the foregoing agreement, the respondent admits the jurisdictional facts alleged in the complaint and agrees, among other things, that the order to cease and desist and to divest there set forth may be entered without further notice and shall have the same force and effect as if en-

tered after a full hearing. The agreement includes a waiver by the respondent of all rights to challenge or contest the validity of the order issuing in accordance therewith; and recites that the said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, and that it is for settlement purposes only, does not constitute an admission by the respondent that it has violated the law as alleged in the complaint, and that said complaint may be used in construing the terms of the order. The hearing examiner finds that the content of the said agreement meets all the requirements of section 3.25(b) of the Rules of Practice.

Such agreement further provides that the charge that respondent's acquisition of Prehler Electrical Insulation Company violated section 7 of the amended Clayton Act should be dismissed for the reasons set forth in an Appendix A attached thereto.

As also set forth in the aforesaid agreement and for the purposes thereof, electrical insulation products shall consist of the following sixteen products and any other product, which may be introduced as a replacement, substitution, or improvement on said sixteen products, which are sold for use by manufacturers of electrical appliances, electrical machinery, electronics apparatus, communication and power cable, and in the repair of motors, generators and transformers.

(1) Varnished fabrics and paper.

(2) Manufactured electrical mica.

(3) Coated electrical sleeving (formerly known as flexible treated tubing and saturated sleeving).

(4) Industrial laminates.

(5) Insulating liquid varnish.

(6) Electrical insulation tape (pressure sensitive).

(7) Extruded plastic tubing.

(8) Steatite.

(9) Polymeric films such as cellulose acetate, polyvinyl chloride, polypropylene, polyethylene, polyester, fluorinated ethylene propylene, and polytetrafluorethylene.

(10) Vulcanized fibre, fish paper, asbestos paper, kraft paper (including condenser tissue), rag paper, and transformer board.

(11) Untreated cotton and glass tapes.

(12) Encapsulating resins and molding compounds—polyester, epoxy, phenolic alkyds, silicone, waxes, and asphaltic compounds.

(13) Wire enamels.

(14) Natural, butyl, buna, neoprene, and silicone rubber.

(15) Liquid dielectrics for distribution transformers, power transformers, circuit breakers, specialty transformers, and capacitors.

(16) Hardwood slot sticks.

For the further purposes of this agreement an electrical insulation distributor is a firm which purchases a line of electrical insulation products, from manufacturers other than a parent or subsidiary, for stock and resale.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the aforesaid agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with section 3.21 of the Rules of Practice; and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order.

Defendant's Exhibit 1

JURISDICTIONAL FINDINGS

1. Respondent Minnesota Mining and Manufacturing Company is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its principal offices and place of business located at 900 Bush Avenue, St. Paul, Minnesota.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent hereinabove named. The complaint states a cause of action against said respondent under section 7 of the Clayton Act, as amended.

ORDER

I.

IT IS ORDERED that respondent Minnesota Mining and Manufacturing Company, its subsidiaries, officers, directors, agents, representatives and employees, shall:

1. On or before January 1, 1962, divest itself absolutely, in good faith, as a unit by sale to a purchaser approved by the Commission of all assets, properties, rights and privileges, including but not limited to all trade-marks, trade names, customer lists, contracts, business and good will acquired by respondent as a result of its acquisition of all of the assets of Insulation and Wires division of the Essex Wire Corporation, and all of the assets of Insulation and Wires Incorporated, a Missouri corporation, and all of the assets of Insulation and Wires Incorporated, a Georgia corporation (hereinafter collectively referred to as Insulation and Wires and presently operated as a division of respondent), together with the additions and equipment of whatever description that is presently utilized by respondent in its Insulation and Wires division, in such manner as to

restore Insulation and Wires as a competitive entity in substantially the same competitive standing it formerly had in the sale and distribution of electrical equipment and electrical insulation products at the time of the acquisition.

2. For a period of five (5) years from the date of divestiture, make available to said purchaser all of the electrical insulation products manufactured by respondent and sold by it to any electrical insulation distributors on the same terms and at the same prices as such products are sold by it to such other distributors.

3. Transfer to said purchaser all sales employees who are presently employed by respondent in its Insulation and Wires division.

II.

IT IS FURTHER ORDERED that in the divestiture of Insulation and Wires by respondent none of the said assets, properties, rights and privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to anyone, who at the time of the divestiture, is an officer, director, employee, or agent of, or otherwise directly or indirectly connected with or under the control of, respondent or any of respondent's subsidiaries or affiliated companies.

III.

IT IS FURTHER ORDERED that for a period of five (5) years from the date of this order respondent shall continue in good faith to operate its subsidiary Prehler Electrical Insulation Company as an electrical insulation distributor and shall cause said Company to purchase not less than 22% of its total annual purchases of electrical insulation products from suppliers other than respondent or its subsidiaries.

Defendant's Exhibit 1

IV.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date of this order respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the assets, stock, or any equity in any electrical insulation distributor in the United States.

V.

IT IS FURTHER ORDERED that, except for the restrictions set forth in Paragraph III of this order, the alegations of the complaint charging that respondent's acquisition of Prehler Electrical Insulation Company violated Section 7 of the amended Clayton Act be dismissed.

EDGAR A. BUTTLE,
Edgar A. Buttle,
Hearing Examiner.

July 20, 1961

Defendant's Exhibit 1

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

PAUL RAND DIXON, Chairman
ROBERT T. SECREST
SIGURD ANDERSON
WILLIAM C. KERN
PHILIP ELMAN

In the Matter of MINNESOTA MINING AND MANUFACTURING COMPANY, a corporation.	Docket No. 7973

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE.

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 24th day of August, 1961, become the decision of the Commission; and, accordingly:

IT IS ORDERED that the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

By the Commission.

JOSEPH N. KUZEW,
Joseph N. Kuzew,
Acting Secretary.

Issued: August 24, 1961

Amended Complaint

(Filed March 19, 1963)

Plaintiff complains and alleges as follows:

First Count

1. This action is brought under the Anti-Trust Laws of the United States, specifically under Section 4 of the Act of Congress of October 15, 1914 entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes," as amended and supplemented, (15 U. S. C. 15) commonly known as the Clayton Act, and Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," (15 U. S. C., Sections 1 and 2) commonly known as the Sherman Anti-Trust Act, all as hereinafter more fully appears.

2. Plaintiff is a corporation organized under the laws of the State of New Jersey, having its principal place of business at Woodbridge, New Jersey. At all times herein under consideration, plaintiff was and still is engaged in the manufacture of electrical insulation products used in electric motors, transformers, cables, generators and appliances, selling and distributing its products throughout the United States by means of independent distributors.

3. Defendants are corporations which maintain offices, transact business and are found in the State of New Jersey. The defendant Minnesota Mining and Manufacturing Company (hereinafter referred to as "3M"), is a Delaware corporation with its principal place of business in St. Paul, Minnesota. For many years prior to 1953, 3M had been a highly diversified manufacturing company, with property and facilities throughout the United States. Among its products were electrical insulation tapes of which it was the nation's leading manufacturer.

4. During the years 1952-1956, 3M engaged in a pattern of corporate acquisitions in the electrical insulation field, extending from the manufacture and distribution of electrical insulation tape to manufacture and distribution of other electrical insulation products. In these acquisitions, 3M obtained control of Irvington Varnish and Insulator Co. (hereinafter referred to as "Irvington Varnish"), a New Jersey corporation, now a division of 3M with manufacturing facilities at Freehold, New Jersey. Irvington Varnish at all times herein under consideration was and still is a leading manufacturer and seller of electrical insulation products, and in direct competition with plaintiff.

5. Additionally, in or about August, 1956, 3M acquired the principal assets of Insulation and Wires, Inc., a nationwide distributor of electrical insulation products upon which the plaintiff had continuously, primarily and successfully relied for the sale, resale and distribution of plaintiff's products throughout the United States.

6. Prior to August, 1956, Insulation and Wires, Inc. (hereinafter referred to as "I.W.I.") had been wholly owned by the defendant, Essex Wire Corp. (hereinafter referred to as "Essex Wire"), a Michigan corporation. Essex Wire, at all times herein under consideration, was and still is a purchaser of a substantial volume of electrical insulation products, with much of its purchasing done from or through I.W.I.

7. At all times herein under consideration, I.W.I. was and still is a distributor of electrical insulation products, distributing through a national network, I.W.I. sales offices being located throughout the United States, including Newark, New Jersey; Boston, Mass.; Detroit, Michigan; St. Louis, Missouri; Houston, Texas; Los Angeles and San Francisco, California; Portland, Oregon; and Atlanta, Georgia. Until its acquisition by 3M, I.W.I. distributed said products for independent manufacturers, with which

it had no affiliation or relationship. In 1956, I.W.I.'s total sales volume of $3,601,000 made it the third largest distributor of electrical insulation products in the United States with a share of the national market of 6% compared to the nation's largest distributor's share of 19%.

8. By means of its acquisitions in the electrical insulation field, 3M became the largest manufacturer and distributor of electrical insulation products in the United States, and directly competitive with plaintiff.

9. Beginning in or about August, 1956 and continuing until the date of the filing of this complaint, defendants have unlawfully contracted, combined and conspired to restrain trade in the manufacture, sale and distribution of electrical insulation products, in interstate commerce, in violation of Section 1 of the Sherman Act.

10. It was part of the combination and conspiracy and the object and purpose thereof to accomplish the following, among other things:

(a) to integrate control over the production, sale and distribution in interstate commerce of certain electrical insulation products by the sale of the principal assets of I.W.I. from Essex Wire to 3M;

(b) to eliminate and suppress competition in the sale of electrical insulation products in interstate commerce by preventing sale of said products by plaintiff to Essex Wire;

(c) to eliminate and suppress competition in the distribution of electrical insulation products in interstate commerce by preventing I. W. I. from distributing and selling plaintiff's products;

(d) to eliminate I. W. I. as an important and effective distributor of electrical insulation products for other producers, in interstate commerce, prior to any resale of I. W. I. by 3M;

(e) to arrange for an exclusive dealing arrangement between Essex Wire and 3M in respect to 3M's purchase of magnet wire from Essex Wire and Essex Wire's purchase of electrical insulation materials from I. W. I. and 3M.

11. For the purpose of carrying out the aforesaid unlawful contracts, combinations and conspiracies, and in furtherance thereof, defendants have done and continued to do the following acts:

(a) In August, 1956, 3M acquired the principal assets of I. W. I. from Essex Wire, paying only nominal value for the former's good will, although its worth was largely in customer contacts and listings;

(b) Thereafter, in September, 1956, 3M expressly stated to plaintiff that as of January, 1957 I. W. I. would terminate distribution of plaintiff's products, thus severing plaintiff's contact with numerous customers previously reached through I. W. I.

(c) Essex Wire, beginning in 1956 and through 1961, repeatedly directed and instructed its employees, including the plant managers and engineers at its various divisions to purchase electrical insulation materials from either I. W. I. or 3M, and not from plaintiff, (although it had been a substantial purchaser of plaintiff's products in preceding years) all in furtherance of the conspiracy.

(d) In conformity with the conspiracy and in furtherance thereof, during each of the years 1957 through 1961, Essex Wire tendered either no or only token order for plaintiff's products despite repeated, direct and personal solicitation in each of those years by plaintiff, or its agent, Insulation Manufacturers Corp.

(e) Pursuant to the conspiracy, and in order to police and inspect the directions to its personnel to purchase only from I. W. I. or 3M, and not from plaintiff, Essex Wire's Director of Purchases in each of the years 1957 through

1961 ordered divisional personnel to submit to him copies of all invoices for electrical insulation material purchases. Continuously during each year, 1957 through 1961, as ordered, purchase invoices were submitted to and personally inspected by Essex Wire's Director of Purchases at Fort Wayne, Indiana, in order to insure that Essex Wire, pursuant to the conspiracy aforesaid, channelled its purchases of electrical insulation away from plaintiff, and, wherever possible to 3M.

(f) In furtherance of the conspiracy, Essex Wire designated its Director of Purchases to receive complaints and reports from 3M personnel concerning 3M sales efforts at Essex Wire divisions, and individuals in the Essex organization who for practical business reasons were refusing or resisting purchase of 3M materials. Numerous such complaints were received and acted upon between 1957 and 1961. During this same period, Essex Wire's Director of Purchases continuously visited plants throughout the country to eliminate objections to purchasing 3M material and to restrain local Essex Wire personnel from purchasing plaintiff's products.

(g) During the period 1956 through 1961 and in furtherance of the conspiracy to eliminate I. W. I. as an effective distributor of electrical insulation products in the event of resale of I. W. I., 3M obtained, directly and indirectly, from I. W. I. and its sales personnel, customer lists and other confidential information which permitted 3M sales personnel to solicit I. W. I. customers directly and to compete with I. W. I. salesmen. 3M salesmen obtained such confidential information, for example, from the I. W. I. San Francisco office by requiring I. W. I. salesmen to divulge sales and customer details to 3M manufacturing plants prior to having orders filled. This information was then given to 3M sales personnel.

In furtherance of the conspiracy, and at 3M's request, Essex Wire in the years 1959 through 1961 placed orders

for 3M material directly with 3M salesmen instead of I. W. I. salesmen who had previously serviced Essex Wire. Essex Wire so acted, pursuant to the conspiracy, despite objections and pleas by I. W. I. sales personnel.

(h) In 1959, pursuant to the conspiracy, officers and employees of 3M and Essex Wire met in Chicago, Illinois, to discuss an offer by a New York electrical insulation distributor to purchase I. W. I. from 3M. The defendants agreed at that time not to sell I. W. I. but to continue operating I. W. I. under 3M ownership. The conspirators agreed at that time that Essex Wire would thenceforth render 3M greater advice and assistance in operating I. W. I. To eliminate the possibility of a sale to an independent third party, it was also agreed that prospective purchasers of I. W. I. would be warned that in the event of any sale thereof Essex Wire probably would no longer purchase its electrical insulation requirements therefrom.

(i) Thereafter, and for approximately six months in 1959 and from time to time through 1961, Essex Wire assigned to 3M its Director of Purchases, who had formerly been President of I. W. I. At no cost to 3M, Essex Wire's Director of Purchases assisted 3M in the operation and management of I. W. I., all in furtherance of the conspiracy.

(j) In furtherance of the conspiracy, and in return for Essex Wire's participation therein, 3M during the period August, 1956 through 1961, purchased, from time to time, its requirements of magnet wire from Essex Wire. 3M during this period repeatedly acceded to Essex Wire demands that 3M refrain from purchasing magnet wire from Essex Wire's competitors.

(k) Pursuant to the conspiracy, and in furtherance thereof, in 1961, 3M resold I. W. I. to Essex Wire, thus insuring that knowledge of all confidential customer information which it had obtained from I. W. I. would be limited to itself and Essex Wire, which had previously owned

I. W. I. and that such confidential information would not be obtained by a third party.

12. By the aforesaid unlawful and continuing contracts, combinations, conspiracies and acts, defendants have attempted to monopolize trade in the manufacture, sale and distribution of electrical insulation products in interstate commerce, in violation of Section 2 of the Sherman Act.

13. The effect on plaintiff of the above mentioned violations of Sections 1 and 2 of the Sherman Act has been and is to disrupt plaintiff's pattern of manufacture, sale and distribution, and to foreclose to plaintiff, a substantial portion of the national market for electrical insulation products and to cause plaintiff to lose the business and good will of numerous customers, whereby plaintiff has suffered and continues to suffer injury and damage to its business and property.

14. Plaintiff, throughout the entire period during which the aforesaid activities have been carried on by defendants has remained ready and willing to manufacture and sell in the manner required by competition.

15. During the period June, 1960 to August, 1961, a proceeding concerning substantially identical subject matter to that which is here alleged and to which 3M was a party was pending before the Federal Trade Commission in Docket No. 7973 entitled *In the Matter of Minnesota Mining and Manufacturing Company.*

SECOND COUNT

1. This civil action is brought under Sections 4 and 7 of the Clayton Act (15 U. S. C., Sections 15 and 18).

2. Plaintiff repeats the allegations of paragraphs 2, 3. 4, 5, 6, 7, 8, and 15 of the First Count and makes them a part hereof as though set forth at length herein.

3. The effect of the aforesaid acquisition, set forth more particularly in Paragraphs 5, 6, 7 and 8 of the First Count was substantially to lessen competition and to tend to create a monopoly in violation of Section 7 of the Clayton Act.

4. As a result of the aforesaid violation of the Clayton Act plaintiff suffered damage and injury.

WHEREFORE, plaintiff demands on both the First and Second Counts hereof:

1. A decree be issued by this court ascertaining damages suffered by plaintiff by reason of defendants' unlawful acts above complained of and awarding a judgment in favor of plaintiff and against defendants in the amount of thrice the damages.

2. That the plaintiff be awarded the costs of this action and defendants be directed to pay them.

3. That plaintiff be awarded attorneys' fees in an amount determined by this court to be reasonable and that defendants be directed to pay such amount.

4. That the plaintiff have such further relief as the court may direct.

HANNOCH, WEISMAN, MYERS, STERN & BESSER,
Attorneys for Plaintiff

By ALBERT G. BESSER
Albert G. Besser
A Member of the Firm

Dated: March 15, 1963.

On Motions

Order

(Filed: April 15, 1963.)

This matter having come on for hearing before the United States District Court for the District of New Jersey (Honorable Anthony T. Augelli, U. S. D. J.) on February 11, 1963, in the presence of Mr. Sidney P. Howell, Jr., of the New York Bar (associated with Charles C. Trelease, Esq.,) for defendant Minnesota Mining and Manufacturing Company; Mr. Murry D. Brochin (associated with Lowenstein and Spicer, Esqs. for defendant Essex Wire Corporation, and Mr. Albert G. Besser (associated with Hannoch, Weisman, Myers, Stern & Besser, Esqs.) for plaintiff New Jersey Wood Finishing Co., upon the Notice of Motion dated December 14, 1962 of defendant Minnesota Mining and Manufacturing Company; the Notice of Motion of defendant Essex Wire Corporation; and the Stipulation of the parties in that regard dated January 25, 1963; and the Court having considered plaintiff's complaint, the affidavits and excerpts from depositions relied upon by the respective defendants, also the certified copy of the record of proceedings of the Federal Trade Commission against the defendant Minnesota Mining and Manufacturing Company, entitled "In the matter of Minnesota Mining and Manufacturing Company, a corporation", Docket No. 7973, instituted June 24, 1960, together with the briefs and arguments of counsel; and good cause appearing;

It is, therefore, on this 15th day of April, 1963, Nunc Pro Tunc As of February 11, 1963;

ORDERED:

1. The complaint be and the same hereby is dismissed with prejudice as against the defendant Essex Wire Corp. with respect to plaintiff's claim for relief against that defendant for violation of Section 7 of the Clayton Act.

2. Plaintiff is given leave to amend the complaint as against defendant Essex Wire Corp. to allege with the

requisite particularity overt acts in violation of the Sherman Act committed within four years immediately preceding the filing of the complaint in this matter.

3. The motion of defendant Minnesota Mining and Manufacturing Company to strike paragraph 9 of the complaint and so much of paragraph 10 as refers to proceedings before the Federal Trade Commission be and the same hereby is granted, except that plaintiff, in its amended complaint, may allege the institution, pendency and general subject matter of said Federal Trade Commission proceedings in order to permit plaintiff to rely thereon as a bar to the defense of the Statute of Limitations raised by the defendant Minnesota Mining and Manufacturing Company.

4. The motion of defendant Minnesota Mining and Manufacturing Company to dismiss the complaint as against it on the grounds that the complaint fails to state a claim upon which relief can be granted, or, in the alternative, for a summary judgment in its favor based on the four year statute of limitations of the Clayton Act, be and the same hereby is continued until March 25, 1963, and the parties are hereby given leave to file supplementary memoranda on the issue of tolling of the Statute of Limitations applicable to plaintiff's causes of action, if any, against defendant Minnesota Mining and Manufacturing Company because of the aforementioned Federal Trade Commission proceedings.

5. All further pre-trial discovery in this matter be and the same hereby is stayed until the further Order of this Court, which Order shall determine the schedule of further discovery in this matter.

ANTHONY T. AUGELLI

Anthony T. Augelli
U. S. D. J.

Opinion On Motion of Defendant Minnesota Mining and Manufacturing Company For Dismissal of Complaint, etc.

(Filed April 19, 1963.)

APPEARANCES:

HANNOCH, WEISMAN, MYERS, STERN & BESSER, ESQUIRES,

By: ALBERT G. BESSER, HERBERT M. GUSTON and RALPH M. LOWENBACH, ESQUIRES, Attorneys for plaintiff;

CHARLES C. TRELEASE, ESQUIRE, Attorney for defendant Minnesota Mining and Manufacturing Company;

SIDNEY P. HOWELL, JR., ESQUIRE (New York Bar), EDWIN E. MCAMIS, ESQUIRE (New York Bar), THOMAS J. LYONS, ESQUIRE (Minnesota Bar), Of Counsel.

AUGELLI, District Judge:

This is a private action under the antitrust laws of the United States, sections 1 and 2 of the Sherman Act, 15 U. S. C. A. Secs. 1 and 2, and section 7 of the Clayton Act, 15 U. S. C. A. Sec. 18.

Plaintiff, New Jersey Wood Finishing Company, is engaged in the manufacture of electrical insulation products in this State and in the sale and distribution of said products by independent distributors throughout the United States, Defendant Minnesota Mining and Manufacturing Company ("3M") is a diversified nationwide manu-

facturing company, also engaged in the electrical insulation field. Defendant Essex Wire Corp. ("Essex") is a substantial customer for electrical insulation products and, until August 1956, owned and operated Insulation & Wires, Inc.

("IWI"), a national distributor of these products for various manufacturers.

Plaintiff is seeking, in both counts of its amended complaint, to recover treble damages as provided by section 4 of the Clayton Act, 15 U. S. C. A. Sec. 15, for injuries suffered to its business by reason of defendants' alleged unlawful acts. The first count of the complaint charges that since August 1956 defendants have conspired to restrain, and attempted to monopolize, trade in the manufacture, sale and distribution of electrical insulation products in interstate commerce, in violation of sections 1 and 2 of the Sherman Act. Plaintiff pleads a number of acts allegedly carried out by defendants in furtherance of their conspiracy and attempted monopolization, beginning with 3M's acquisition of IWI from Essex in August 1956 and up to the filing of the original complaint in this case on November 20, 1961. The second count alleges that the effect of such acquisition was substantially to lessen competition and to tend to create a monopoly, in violation of section 7 of the Clayton Act. By order of this court filed April 15, 1963, Essex was dismissed as a defendant in count two of the complaint.

Defendant 3M has, by stipulation, deferred filing its answer and moves at this time that the complaint be dismissed, pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted; or, in the alternative, that summary

judgment be entered in its favor pursuant to Rule 56(b) of the Federal Rules. The basis for this motion is the four year statute of limitations in section 4b of the Clayton Act, 15 U. S. C. A. Sec. 15b, which provides that "[a]ny action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. * * *"

Opinion On Motion of Defendant Minnesota Mining and Manufacturing Company For Dismissal of Complaint, etc.

This action is admittedly brought under section 15 of Title 15, which is section 4 of the Clayton Act. Therefore, plaintiff can apparently only maintain its cause of action against 3M if such action accrued since November 20, 1957, four years prior to the date the original complaint was filed. Since 3M's acquisition of IWI, which is conceded by the parties to be the main thrust of plaintiff's claim in both counts, took place in August 1956, outside the four year limitation period, 3M argues that plaintiff's causes of action under the Sherman and Clayton Acts are now barred.

Plaintiff contends that even assuming that its cause of action against 3M accrued in August 1956, the running of the statute of limitations was tolled by section 5 (b) of the Clayton Act, 15 U. S. C. A. Sec. 16(b). That section provides as follows:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, * * * the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

—3—

Plaintiff alleges in its complaint that during the period between June 1960 and August 1961, "a proceeding concerning substantially identical subject matter to that which is

here alleged and to which 3M was a party was pending before the Federal Trade Commission in Docket No. 7973 entitled *In the Matter of Minnesota Mining and Manufacturing Company*". 3M, conceding the existence of these proceedings, has filed, as an appendix to its reply brief, a certified copy of the complaint and consent order in the Commission action. These papers make clear that the complaint before the Federal Trade Commission was brought against 3M for alleged violations of section 7 of the Clayton Act in the acquisition of a number of companies in the electrical insulation field. Among the acquisitions by 3M involved in those proceedings was the purchase of IWI from Essex in August 1956. The complaint of the Commission alleged that the effect of these acquisitions, "and of each of them, may be substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution and sale of electrical insulation products * * * in various sections of the country". This action was ultimately terminated by a consent order whereby 3M agreed to divest itself on or before January 1, 1962 of all the assets of IWI.

The issues involved on this motion concern the applicability of section 5(b) of the Clayton Act to these Commission proceedings. If these proceedings come within the meaning of section 5(b), the running of the statute of limitations would have been tolled against 3M as to any matter complained of therein. Then, the complaint filed in this case on November 20,

1961 would be timely as to any cause of action based on 3M's acquisition of IWI in August 1956, since the action was commenced within one year of the termination of the Commission proceedings.

First. Defendant 3M argues that section 5(b) of the Clayton Act is not operative where, as here, the earlier

proceedings are terminated by consent before any testimony has been taken. This contention is based on section 5 (a) of the Clayton Act, 15 U. S. C. A. Sec. 16(a), which reads as follows:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws * * *, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *."

3M claims that the proviso in section 5(a), prohibiting the use of a consent judgment as prima facie evidence in a subsequent action, also applies to the tolling provision in section 5(b), and that therefore a proceeding terminated by consent cannot toll the statute of limitations.

This Court is of the opinion that the consent judgment proviso was intended to apply solely to the prima facie evidence provision in section 5(a). The proviso is grammatically a part of the single sentence which comprises section 5(a), separated only by a colon. Section 5(b) is separate and apart, and makes no reference to "judgments or decrees". It is the "pendency" of a "proceeding" that operates to toll the

running of the statute of limitations, and the manner of termination of that proceeding is not a factor under the language of section 5(b).

Opinion On Motion of Defendant Minnesota Mining and Manufacturing Company For Dismissal of Complaint, etc.

Second. Defendant contends that the action brought by the Federal Trade Commission is not a "civil • • • proceeding • • • instituted by the United States to prevent, restrain, or punish violations of • • • the antitrust laws" within the meaning of section 5(b) of the Clayton Act. The argument is that the quoted language refers only to a judicial proceeding brought by the Antitrust Division of the Justice Department, and not to an administrative proceeding instituted by the Federal Trade Commission. 3M points out the well-known distinctions between judicial and administrative proceedings, and conjectures that Congress could not have intended a Commission proceeding to have such an effect without writing more specific language into the statute.

The cases coming to the Court's attention dealing with the tolling question have all involved prior Department of Justice proceedings. There appear to be no decisions as to whether or not section 5(b) is applicable in the case of a Federal Trade Commission proceeding. 3M has cited *Proper* v. *John Bene & Sons, Inc.*, 295 Fed. 729 (E. D. N. Y. 1923), which contains dicta to the effect that a proceeding before the Federal Trade Commission is not brought by the United States under the antitrust laws. But the *Proper* case involved the very different question of the res judicata effect of proceedings under the Federal Trade Commission Act pursuant to the present section 5(a) of the Clayton Act. There certainly can

be no doubt that a proceeding brought by the Commisison under section 7 of the Clayton Act is an action under the "antitrust laws". See section 1 of the Clayton Act, 15 U. S. C. A. Sec. 12. Nor can there be much doubt today that a Commission proceeding is an action brought by the United States. See *Brunswick-Balke-Collender Co.* v. *American Bowling & Billiard Corp.*, 150 F. 2d 69 (2 Cir. 1945).

In the final analysis, the resolution of the issue of the applicability of the tolling provision in section 5(b) to Commission proceedings depends upon the legislative purposes behind the adoption of that section. It seems clear that Congress intended by section 5(b) to allow antitrust litigants an opportunity, which might otherwise be barred by the four year statute of limitations, to take advantage of facts uncovered in related Government proceedings. See Sen. Rep. 619, 84th Cong., 1st Sess., U. S. Code Cong. & Admin. News, p. 2332 (1955); *Union Carbide & Carbon Corp. v. Nisley*, 300 F. 2d 561, 569 (10 Cir. 1962). Thus, a private party which has suffered damages to its business by reason of unlawful antitrust activity is permitted additional time to derive the benefits of a Government investigation. This purpose has nothing whatever to do with the competency of the evidence generated by the Government proceeding, or with which agency prosecuted the violation for the Government.

Both the Federal Trade Commission and the Department of Justice have concurrent jurisdiction over violations of section 7 of the Clayton Act. See section 11 of the Clayton Act, 15 U. S. C. A. Sec. 21. It certainly would seem not to have

been the Congressional intent to have plaintiff's rights turn on the fortuitous circumstance of which agency initiated the action. To permit a plaintiff to take advantage of facts uncovered as a result of a Department of Justice proceeding, but not as a result of a Federal Trade Commission proceeding brought under the same statute, does not seem logical. Thus, the difference between judicial and administrative proceedings has no meaning in the light of section 5(b)'s purpose to permit a plaintiff to take advantage of facts uncovered during the pendency of a Government proceeding. The Court, therefore, finds that the action before the

Commission is a proceeding within the meaning of section 5(b) of the Clayton Act which tolls the running of the statute of limitations.

Third. The remaining issue concerns the extent to which the complaint filed in this Court is saved by the tolling provision. Concededly, the running of the statute of limitations would be tolled with respect to plaintiff's claim under section 7 of the Clayton Act, based on 3M's acquisition of IWI in August 1956, which was the subject of the Commission proceeding. But plaintiff contends that the statute is also tolled as to its claims of conspiracy and attempt to monopolize under sections 1 and 2 of the Sherman Act.

Section 5(b) of the Clayton Act tolls the statute "in respect of every private right of action arising under [the antitrust] laws and based in whole or in part on any matter complained of in [the Government] proceeding". The Sherman Act claims involved here are, at least "in part", based on the same "matter complained of" in the Com-

mission proceeding. The factual issues, centering around 3M's acquisition of IWI in August 1956 and the consequent effects of such acquisition on competition in the electrical insulation field, appear to be substantially identical in the two proceedings. See *Union Carbide & Carbon Corp.* v. *Nisley, supra,* p. 570. Thus, facts uncovered by the Government in the Commission proceeding would seem to bear on the issues which are involved in this case under sections 1 and 2 of the Sherman Act.

For the reasons stated, this Court holds that section 5(b) of the Clayton Act tolled the running of the statute of limitations as to both the Clayton and Sherman Act counts of the complaint against 3M in this case. Defendant 3M's motion for dismissal, or, in the alternative, for a summary judgment will be denied. Submit order.

On Motions

Order

(Filed April 19, 1963)

This matter having come on for hearing before the United States District Court for the District of New Jersey (Honorable Anthony T. Augelli, U. S. D. J.) on March 25, 1963, in the presence of Mr. Sidney P. Howell, Jr. of the New York Bar (associated with Charles C. Trelease, Esq.,) for defendant Minnesota Mining and Manufacturing Company; Mr. Murry D. Brochin (associated with Lowenstein and Spicer, Esqs.) for defendant Essex Wire Corporation, and Mr. Albert G. Besser (associated with Hannoch, Weisman, Myers, Stern & Besser, Esqs.) for plaintiff New Jersey Wood Finishing Co., upon the Notice of Motion dated December 14, 1962 of defendant Minnesota Mining and Manufacturing Company; the Notice of Motion of defendant Essex Wire Corporation; and the Stipulation of the parties in that regard dated Jaunary 25, 1963; and the Court having considered plaintiff's complaint, the affidavits and excerpts from depositions relied upon by the respective defendants, also the certified copy of the record of proceedings of the Federal Trade Commission against the defendant Minnesota Mining and Manufacturing Company, entitled "In the matter of Minnesota Mining and Manufacturing Company, a corporation", Docket No. 7973, instituted June 24, 1960, together with the briefs and arguments of counsel; and good cause appearing;

It is, therefore, on this 19th day of April, 1963,

ORDERED:

1. The motion of defendant Minnesota Mining and Manufacturing Company (continued from February 11, 1963) to dismiss the complaint as against it on the ground that it fails to state a claim upon which relief can be granted, or, in the alternative, for a summary judgment in its favor based on the four year statute of limitations of

the Clayton Act, be and the same hereby is denied because of the Court's conclusion that the Statute of Limitations was tolled in regard to both the alleged Clayton Act and Sherman Act violations committed by Minnesota Mining and Manufacturing Company by the aforementioned Federal Trade Commission proceeding against defendant Minnesota Mining and Manufacturing Company.

2. This Order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal by defendant Minnesota Mining and Manufacturing Company from this Order may materially advance the ultimate termination of this litigation.

3. In the event that application is made for leave to appeal from this Order, all proceedings in this matter are to be stayed pending the outcome of such application. If leave to appeal is granted, said stay is to continue until the appeal is decided and until the further Order of this Court.

4. The motions of defendant Minnesota Mining and Manufacturing Company and this Court's rulings thereon shall be deemed to extend to the amended complaint filed herein on March 19, 1963.

ANTHONY T. AUGELLI

Anthony T. Augelli, U. S. D. J.

On Motion

Notice of Appeal

(Filed May 16, 1963)

Notice is hereby given that, pursuant to an Order of the United States Court of Appeals for the Third Circuit, dated May 9, 1963, granting permission for such appeal, Minnesota Mining and Manufacturing Company, one of the defendants above named, hereby appeals to said United States Court of Appeals for the Third Circuit from Paragraph 1 of the Order of the United States District Court for the District of New Jersey (Hon. Anthony T. Augelli, D.J.) entered April 19, 1963, denying said defendant's motion in that Court based upon the Statute of Limitations governing antitrust actions as provided by Section 4B of the Clayton Act as amended, 15 U. S. C. Sec. 15b.

Dated: May 16, 1963

CHARLES C. TRELEASE
(Charles C. Trelease)
Attorney for Defendant-Appellant
Minnesota Mining and Manufacturing
Company
744 Broad Street,
Newark 2, N. J.

[fol. 63]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,487

NEW JERSEY WOOD FINISHING COMPANY, Plaintiff-Appellee,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Defendant-Appellant,

and ESSEX WIRE CORP., Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 10, 1963

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and HASTIE, *Circuit Judges*.

OPINION OF THE COURT—Filed May 20, 1964

By MCLAUGHLIN, *Circuit Judge*.

This is an interlocutory appeal under 28 U.S.C. Section 1292(b) from a denial of a defense motion to dismiss based on the statute of limitations.

Plaintiff-appellee is the New Jersey Wood Finishing Company (N. J. Wood), a New Jersey corporation engaged in the manufacture of certain electrical insulation [fol. 64] products. Defendant-appellant is the Minnesota Mining and Manufacturing Company (3M), a Delaware Corporation, doing business in New Jersey and likewise engaged in the electrical insulation field.

On June 24, 1960, the Federal Trade Commission (FTC) had issued a complaint against 3M, charging that 3M "has violated and is now violating the provisions of Section 7

of the Clayton Act (U.S.C. Title 15, Section 18) as amended, * * *." That FTC complaint substantially alleged the following:

For a number of years prior to 1953, 3M was a highly diversified company, manufacturing and selling a number of product lines and segments thereof. From 1952 to 1956, 3M began to acquire the operations of a number of manufacturers and various product groups, particularly in the electrical insulation field. During this period it also bought several distributor companies. In March 1956, 3M absorbed Prehler Companies, the second largest distributor (15% of sales) of electrical insulation products in the United States, and in August 1956, it absorbed Insulation and Wires, Inc. (IWI), the third largest such distributor (14% of sales). After obtaining these corporations, 3M became the largest such distributor, having around 29% of the total sales of electrical insulation products sold and distributed by electrical instrument distributors in the United States.

By these acquisitions, 3M further became the second largest distributor of seven (7) of the electrical insulation products it manufactured and had 18% of the total sales of these products. In 1958 3M's sales of these products through its acquired distributors, increased to about 21% of the total sales of said products, while the sale of those seven products by the largest electrical insulation distributor decreased to less than 21%.

By virtue of 3M's acquisition of these distributor corporations, other manufacturers who had previously dealt with Prehler and IWI found this market closed to them. [fol. 65] Similarly other distributors, who had been supplied with products by 3M and the other manufacturers 3M acquired, found this source of supply cut off.

The FTC complaint asserted that the effect of the acquisitions of Prehler and IWI, and of each of them, by 3M may be substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution, and sale of electrical insulation products, individually and collectively in various sections of the country within the

meaning of Section 7 of the Clayton Act as amended. The complaint thereafter specified these injurious effects.[1]

The FTC complaint concluded by charging that:

"The foregoing acquisitions, acts and practices of respondent, * * * constitute a violation of Section 7 of the Clayton Act as amended and approved December 29, 1950:

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[1] The aforesaid effects include the actual or potential lessening of competition and a tendency to create a monopoly in the following ways, among others:

1. Minnesota Mining, as the largest producer of electrical insulation tape, and with its acquisitions of leading manufacturers of other electrical insulation products, by acquiring two of the three largest distributors of electrical insulation products in the United States, has extended and integrated its business in such a manner as to substantially increase its position in the manufacture, sale and distribution of electrical insulation products; and it may exercise the inherent powers of its acquired position to substantially lessen competition or tend to create a monopoly in the manufacture, sale and distribution of electrical insulation products.

2. Manufacturers of electrical insulation products have been foreclosed from a substantial share of the markets for said products.

3. Competition has been eliminated between Prehler and IWI in the distribution and sale of electrical insulation products in the sections of the country in which they were competing, and potential competition has been eliminated between said companies throughout the United States.

4. Actual and potential competition has been eliminated between Minnesota Mining and the two acquired distributors.

5. As a leading manufacturer and distributor of electrical insulation products Minnesota Mining has acquired a position whereby it may:

(a) Manipulate prices or use other means to lessen competition or tend to create a monopoly; and

(b) Concentrate the full impact of its sales, promotional and merchandising experience and ability on one of its electrical insulation products, or on one selected section of the country.

6. Concentration of the manufacture, sale and distribution of electrical insulation products may be increased.

[fol. 66] "WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 24th day of June, A.D. 1960 issues its complaint against said respondent."

Apparently before any testimony was taken, this FTC proceeding was terminated by consent order entered July 20, 1961, under which 3M was ordered inter alia to divest itself absolutely of all the assets of Insulation and Wires Division (IWI) of the Essex Wire Corporation and its related corporations.

On November 20, 1961, N. J. Wood filed its complaint in this action alleging that 3M had violated Section 1 and Section 2 of the Sherman Act (15 U.S.C. Sections 1, 2 (1958)) and Section 7 of the Clayton Act (15 U.S.C. 18 (1958)) to its (N. J. Wood's) injury, for which under Section 4 of the Clayton Act (15 U.S.C. 15 (1958)) it was entitled to treble damages. N. J. Wood claimed that 3M had acquired IWI in violation of these antitrust statutes and deprived it of a substantial national market for its products.

3M moved to strike N. J. Wood's complaint because the cause of action accrued more than four years before the commencement of the suit and was therefore barred by the statute of limitations. N. J. Wood opposed the motion, arguing that the statute was tolled under 5(b) of the Clayton Act by virtue of the FTC proceeding against 3M.

On March 19, 1963, an amended complaint was filed by direction of the court. Its gravamen is the same as are the controlling legal questions.

On the motion, the trial judge held that the proceeding by the FTC to enforce Section 7 of the Clayton Act was a "civil or criminal proceeding • • • instituted by the [fol. 67] United States" within the meaning of Section 5 of the Clayton Act (15 U.S.C. 16 (1958));[2] that the statute

[2] The first paragraph of Section 5 (now 5(a) (15 U.S.C. 16(a)) provides:

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on

of limitations was therefore tolled and plaintiff's filing of the complaint in this cause against 3M was timely. New Jersey Wood Finishing Company v. Minnesota Mining & Manufacturing Company, 216 F.Supp. 507 (D.C. N.J. 1963).

N. J. Wood's claim arises in the first instance under Section 4 of the Clayton Act, which provides that "persons" injured by violations "of the antitrust laws" shall be entitled to threefold damages. 15 U.S.C. 15 (1958) "Antitrust laws" as that term is employed in Section 4 has a restricted meaning. Notwithstanding other antitrust acts prior or subsequent to the Clayton Act, private parties can recover under Section 4, only where their injury has resulted from acts in violation of the specific antitrust laws, itemized in Section 1 of the Act.[3] 15 U.S.C. 12 (1958);

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behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 4A."

The second paragraph of Section 5 (now 5(b)) (15 U.S.C. 16(b)) provides:

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, * * * the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

[3] These "antitrust laws" are: The Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209); The Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730); and the Wilson Tariff Act (Act of

[fol. 68] Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958). The Sherman and Clayton Acts upon violations of which N. J. Wood's complaint is based, are "antitrust laws" within the meaning of Section 4. Other acts are not, including for our purposes, the Federal Trade Commission Act. See Samson Crane Co. v. Union National Sales, 87 F.Supp. 218 (D.C. Mass. 1949).

In its scheme for the enforcement of these "antitrust laws", Congress envisaged both public and private actions. United States v. Borden Co., 347 U.S. 514, 519 (1954); United States v. Cooper Corp., 312 U.S. 600, 608, 610 (1941); United States v. Bendix Home Appliances, 10 F.R.D. 73, 77 (S.D. N.Y. 1949); see 2 Toulmin's Antitrust Laws, Section 16.6 P. 91 (1949); MacIntyre, The Role of the Private Litigant in Antitrust Enforcement, 7 Antitrust Bulletin, P. 113, et seq. (1962). Through Section 4, the business public became an ally of government and the private antitrust suit, a substantial weapon of national antitrust policy. Cinnamon v. Abner A. Wolf, Inc., 215 F.Supp. 833, 834 (E.D. Mich. 1963), citing Report of the Attorney General's National Committee to Study the Antitrust Laws, P. 378 (1955). Congress had hoped that these private antitrust suits would supplement government actions and perhaps in some cases make them unnecessary.[4]

August 27, 1894, c. 349, Section 73-77, 28 Stat. 57 as amended Act of February 12, 1913, c. 40, 37 Stat. 667).

[4] "At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for private treble damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money.

"The enactment of the Clayton Act in 1914 was in part a recognition by the Congress that Section 7 of the Sherman Act had not successfully stimulated private litigation for enforcement of the Sherman Act * * *.

"Since the enactment of the Clayton Act, the bulk of private antitrust litigation has followed successful Government action, so that the judgments and decrees in the Federal proceedings could

[fol. 69] This broad plan of private and public actions is further detailed. The Sherman Act[5] contemplates civil (Section 4) and criminal (Section 3) actions by the Justice Department, and treble damage suits by private parties (Section 7). 15 U.S.C. Sections 3, 4, 15 (1958); but cf. Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948). Under the Clayton Act,[6] private actions may

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be used to establish a case. "Amassing evidence (sic) for antitrust cases would otherwise be a prohibitively expensive task for most plaintiffs." S. Rep. No. 619, 84 Cong., 1st Sess. June 21, 1955; U. S. Code Cong. & Ad. News, 2329 (1955).

[5] The Sherman Act was the first piece of Federal Antitrust legislation. Passed in 1890, the act sought to protect commerce against unlawful restraints and monopolies, and preserve freedom of competition. Act of July 2, 1890, c. 647, 26 Stat. 209. Standard Oil v. United States, 221 U.S. 1, 50, 52 (1911). The era in which it was enacted was one "of trusts" and "combinations of business and capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." Apex Hosiery Co. v. Leader, 310 U.S. 469, 491-493 (1940). The Sherman Act was not only an immediate legislative answer to this threat, but a declaration of policy as well. It was basically a criminal statute, but Section 4 of that act also provided for enforcement by civil actions by the Justice Department through the various United States Attorneys. Section 7 also gave a private right of action for treble damages. This latter section was for practical purposes absorbed in Section 4 of the Clayton Act of 1914, but its repeal was not pronounced until 1955. Act of July 7, 1955, c. 283, § 3, 69 Stat. 283.

[6] The Sherman Act applied solely to consummated contracts and conspiracies. Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355 (1922). In 1914, Congress enacted the Clayton Act which sought to reach certain specific practices, considered dangerous to free competition in commerce and trade, but not covered by the Sherman Act. Act of October 15, 1914, c. 323, 38 Stat. 730. Standard Fashion Company v. Magrane-Houston Co., 258 U.S. 346, 356 (1922); Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 738 (1945). It was thought that by making these practices illegal, the creation of trusts, conspiracies and monopolies would be arrested in their inception. See United States v. United Shoe Machinery Co., 264 Fed. 138, 162 (E.D. Mo. 1920), quoting the report of the Senate Committee.

be in the form of suits for injunctive relief (Section 16) or for treble damages (Section 4). 15 U.S.C. Sections 26, 15 (1958); public actions, in the form of suits principally by the FTC and the Justice Department under Section 11 for violations of Sections 2, 3, 7 and 8 of that act. 15 U.S.C. 21 (1958).

To be distinguished is the role of the FTC under the FTC Act.

The Federal Trade Commission was established under the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717) and invested with both [fol. 70] adjudicatory and investigatory functions. Under Section 5 (of the FTC Act) the FTC was empowered to order the discontinuance of "unfair methods of competition" and later "unfair * * * practices" which were declared "unlawful" by the Act. See the extensive legislative history in Judge Denison's partial dissent in L. B. Silver Co. v. Federal Trade Commission, 289 Fed. 985, 992-998 (6 Cir. 1923); Federal Trade Commission v. Klesner, 280 U.S. 19 (1929); Federal Trade Commission v. Raladam Co., 283 U.S. 643, 647 (1931). Purposefully left broad and generally undefined (as to what constituted an "unfair method of competition" or an "unfair practice"), Section 5 proceeded on the idea of an administrative body of experts (the FTC) which, given a flexible standard of judgment, would discover and prevent the use of such practice before it worked a Sherman violation. See Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392, 394 (1953); Federal Trade Commission v. Raladam Co., 283 U.S. 643, 648 (1931); see Beer, Federal Trade Law and Practice (1942) P. 76-77. The Sherman Act was to serve as a guide for the Commission, as a "declaration of policy", to be considered in determining what constituted an unfair method of competition. Federal Trade Commission v. Beech Nut Packing Co., 257 U.S. 441 (1922); Standard Oil Co. v. Federal Trade Commission, 282 Fed. 81, 86-87 (3 Cir. 1922) affirmed 261 U.S. 463 (1923).

Within this area of "unfair methods of competition," the FTC Act and the Clayton Act overlap. At the time of the enactment of the Clayton Act, it was believed that

its specific prohibitions particularly Section 2 and Section 3 (15 U.S.C. Sections 13, 14 (1958)) would be covered by Section 5 of the FTC Act. However, Congress, by declaring these practices unlawful specifically in the Clayton Act, took away from the Commission its informed [fol. 71] judgment respecting them.[7] These "unfair methods of competition (later amended to include "unfair * * * practices"), whether prohibited specifically under the Clayton Act, or generally under the FTC Act, were to be restrained according to a congressional design. While Section 5 of the FTC Act was to be enforced by the FTC, Section 11 of the Clayton Act provided a scheme of dual enforcement of Sections 2, 3, 7 and 8 of that act, by the FTC and the Justice Department; and while the underlying substantive violation of Section 5 (FTC Act) did not give rise to a private right of action (the FTC Act was not an antitrust law within the meaning of Clayton Section 4), a violation of Sections 2, 3, 7 and 8 did, no matter by which agency, if either of them, they were enforced. In short, the FTC Act bolstered the Clayton and Sherman Acts both by restraining evils, which might also constitute violations of those acts, and by reaching areas not covered by their proscriptions. These three acts are "interlaced" remedially as well as substantively evincing a Congressional desire for a "cumulative remedy" for the threats and dangers to trade and competition. See Federal Trade Commission v. Cement Institute, 333 U.S. 683, 694-695 (1948); United States v. Borden Company, 347 U.S. 514, 518 (1954). 51 Cong. Rec. 16274-16275 (1914). The question here presented concerns in part the "cumula-

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[7] From the House version of the Clayton bill (H.R. 15657) the Senate Committee had stricken what eventually became Sections 2 and 3 of the Act because it felt that these "unfair methods of competition" would be covered by Section 5 of the FTC Act. A long debate ensued in the Senate. See 13963, 14088-14100; 14200-14229; 14249-14276 (1914). Finally the Senate voted to restore them to the Clayton bill, mainly for the reasons stated by Senator Clapp: to declare these practices unlawful specifically and withdraw them from the judgment of the commission. 51 Cong. Rec. 14257 (1914).

tive remedy" Congress provided for the violation of Section 7 of the Clayton Act. In the case at bar, both the FTC (under Section 11) and N. J. Wood (under Section 4) had brought actions based on the violation of Section 7. N. J. Wood claims that, by virtue of the FTC proceeding, it is entitled to the benefits of Section 5 of the Clayton Act. Section 5 is auxiliary to Section 4 and provides for the tolling of the statute of limitations in favor [fol. 72] of potential private suitors during the pendency of certain government antitrust suits. 3M, however, contends that the FTC proceeding is not a proceeding instituted by the United States within the meaning of Section 5.

As we indicated above, specifically granted in Section 11 of the Clayton Act, (15 U.S.C. 21 (1958)), was the jurisdiction of the FTC to enforce compliance with Sections 2, 3, 7 and 8 of the Act, (15 U.S.C. 13, 14, 18, 19 (1958)) to be shared concurrently with the Justice Department. (See footnote 12 infra.) United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953); Standard Oil Co. v. United States, 337 U.S. 293, 310 (Note 13) (1949); United States Alkali Export Association, Inc. v. United States, 325 U.S. 196 (1945). In the latter opinion, at P. 206-209 Chief Justice Stone described the enforcement of these provisions as one of "efficient cooperation" between the "two agencies". This relationship was further cemented in 1950 when Congress amended Section 11, giving the Attorney General the right to intervene in an FTC Clayton Act proceeding. Act of December 29, 1950, c. 1184, 64 Stat. 1125; House Report No. 1191, August 4, 1949, 81 Cong. 1st Session; S. Report No. 1775 June 2, 1950 81st Cong. 2d Session. See also Final Report of Attorney General's National Committee to study Antitrust Laws, G.P.O. March 1955 at P. 375, et seq. We believe that when Congress vested authority in the FTC to enforce the Clayton Act provisions, it designated the FTC as a "representative of the United States" having "authority to represent its interest in a final adjudication" of an alleged Clayton antitrust violation. Sunshine Coal Co. v. Atkins, 310 U.S. 381 (1940); United States v. Willard Tablet Co., 141 F.2d 141 (7 Cir. 1944); United States v. R. C. A., 358 U.S. 334 (1959). In the latter case, the Supreme Court held

that because the Federal Communications Commission (FCC) had not the power and authority to decide the antitrust issue there presented, the United States would not be estopped by any determination made therein. Underwritten in that decision is the thought that if the FCC [fol. 73] had the power and authority to decide those antitrust issues, FCC would have been regarded in that instance as a representative of the United States.[8] R. C. A. case, supra, P. 352. This clearly negates the proposition offered by 3M in this appeal, that suits by the United States and proceedings by the FTC must be regarded as distinct, because "agency determinations do not bar antitrust suits". The cases cited by 3M[9] deal fundamentally with questions of primary jurisdiction over matters having antitrust implications. They hold merely that agency determinations in proceedings brought in regulation of other laws (e.g., Interstate Commerce Act, Natural Gas Act) without authority to adjudicate antitrust issues will not bar antitrust suits by the United States. Cf. Pan American Airways v. United States, 371 U.S. 296 (1963). In the FTC proceeding at issue, where the Commission under Section 11 was directly given such authority to enforce the Clayton Act, such action must be regarded as one on behalf of the United States, the interests of which are now further protected by Attorney General's right of intervention.

Any argument that an FTC proceeding is not a suit by the United States must meet the reality that whether the Commission functions under the Clayton or the FTC

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[8] We do not consider that Section 11(e) of the Clayton Act or the case of United States v. W. T. Grant, 345 U.S. 629, 632 (1953) compels the conclusion that both the FTC and the Justice Department can bring separate proceedings against a single defendant for the same alleged violation under Section 11. Rather Section 11(e) would seem to indicate that a suit by the FTC under Section 11 should not work to relieve a defendant from a private antitrust suit. 15 U.S.C. 21(e) (1958). See 51 Cong. Rec. 16274 (1914).

[9] Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1959); United States v. Borden Co., 308 U.S. 188 (1939); California v. Federal Power Commission, 369 U.S. 482 (1962).

Act, it does so in the public interest and as an administrative arm of the Government. See 16 C.F.R. Section 1.21 Rules of Practice of the Federal Trade Commission; Federal Trade Commission v. Cement Institute, 333 U.S. 683, 692-693 (1948); Federal Trade Commission v. Grantz, 253 U.S. 421, 432, 435 (1920), Justice Brandeis dissenting but not as to the functioning of the Commission; certainly an FTC proceeding under Section 11 of the Clayton Act [fol. 74] should not be rendered an anomaly in the Congressional plan for "antitrust law" enforcement. This plan definitely contemplates private and public actions, with some of these public actions, being brought by the FTC under Section 11. As Judge Augelli succinctly phrased it below:

> "It certainly would seem not to have been the Congressional intent to have plaintiff's rights turn on the fortuitous circumstances of which agency initiated the action. To permit a plaintiff to take advantage of facts uncovered as a result of a Department of Justice proceeding but not as a result of a Federal Trade Commission proceeding brought under the same statute, does not seem logical." New Jersey Wood Finishing Co. v. Minnesota Mining and Manufacturing Co., 216 F. Supp. 507, 510 (D.C. N.J. 1963).

The sole reason for Section 5 of the Clayton Act was to stimulate private antitrust suits (see footnote 4) and aid such private suitors. As it appears that the FTC is the primary enforcing agency of Section 7 of the Clayton Act (see United States v. Philadelphia National Bank, 374 U.S. 321 (1963)),[10] to hold that such a proceeding was

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[10] Opinion by Mr. Justice Brennan at P. 346:

> "The legislative history shows that the objective of including the phrase 'corporation subject to the jurisdiction of the Federal Trade Commission' in Section 7 was not to limit the amalgamations to be covered by the amended statute but to make explicit the role of the FTC in administering the section. The predominant focus of the hearings, debates, and committee reports was upon the powers of the FTC * * * Furthermore, although the Clayton Act has always provided for dual en-

not within Section 5(b) would thwart in part the Congressional scheme for the enforcement of Section 7. We think it must follow that a Section 4 private right is preserved by a Government action to enforce Section 7, whether that action is brought by the Justice Department or the FTC; that it is not a question whether it is a ju-[fol. 75] dicial or an administrative proceeding but rather whether it is a proceeding on behalf of the United States to enforce the "antitrust laws".

It is also asserted that an action by the FTC is not a "proceeding in equity", as Section 5 originally provided.[11] Certainly, when the Justice Department seeks an injunction against a defendant for violation of the Clayton Act, its purpose is to prevent irreparable injury to the public weal by the traditional equitable remedy. Section 15 of the Clayton Act, 15 U.S.C. 25 (1958); United States v. Borden Co., 347 U.S. 514, 518 (1954). The effect of the FTC proceeding is essentially the same, by virtue of the 1959 amendment to Section 11, hereinafter referred to as the Finality Act of 1959.[12] Act of July 23, 1959, Pub-L

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forcement by court and agency (cites), prior to the 1950 amendment, enforcement of Section 7 was left largely to the FTC. Martin, Mergers and the Clayton Act (1959) 205, 219; Montague, The Celler Anti-Merger Act: An Administrative Problem in an Economic Crisis, 37 A.B.A.J. 253 (1951). And the impetus to amend Section 7 came in large part from the FTC (cites). Congress in 1950 clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction." See also Mr. Justice Harlan's dissent at p. 392, supra.

[11] See footnote 2. Section 5 now reads "civil * * * proceeding" instead of "suit or proceeding in equity".

[12] Section 11 provides:

"(a) That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: * * * in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

"(b) Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person

[fol. 76] 86-107, Section 1, 73 Stat. 243. Formerly the FTC had to seek the enforcement of its order—after its determination of a Clayton Act violation, and a subsequent violation of the order (See Federal Trade Commission v.

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is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person [and the Attorney General (amended Dec. 29, 1950, c. 1184, 64 Stat. 1125] a complaint stating its charges in that respect, and containing a notice of a hearing * * *. The person so complained of shall have the right to appear * * * and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. [The Attorney General shall have the right to intervene and appear in said proceeding (amended, 64 Stat. 1125)]. * * * If up such hearing, the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * *.

"(c) (as amended by the Finalty Act of 1959, 73 Stat. 243). Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the Court of Appeals of the United States * * * by filing with the court * * * a written petition praying that the order of the commission or board be set aside. * * * Upon such filing of the petition the court * * * shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, * * * To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. * * * The judgment and decree of the court shall be final except that the same shall be subject to review by the Supreme Court upon certiorari * * *.

"(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify or set aside orders of the commission or board shall be exclusive.

"(e) * * * No order of the commission or board or judgment of the court to enforce the same shall in anywise relieve

Ruberoid Co., 343 U.S. 470 (1952))—by a petition to the Court of Appeals; but now enforcement decrees by the Circuit Court of Appeals are unnecessary and the orders become final and self-executing by the expiration of defendant's time to seek review.

The legislative history of the FTC Act and the Clayton Act, indicates that the FTC cease and desist order originally was to be more in the nature of "notice" of violation than an injunctive measure. The bare order had "no effect in itself, unless made operative by the Circuit Court of Appeals, * * *." Proper v. John Bene and Sons, Inc., 295 Fed. 729, 731 (E.D. N.Y. 1923). The FTC functioned as an investigatory body which would judge and note violations of the Acts. In formulating its findings and order, it presented itself in a manner analogous to a [fol. 77] Master in Equity to the Court of Appeals [See address of William H. Taft, of October 20, 1914, reported

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or absolve any person from any liability under the antitrust laws.

"(f) * * *

"(g) Any order issued under subsection (b) shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

(2) * * *

(3) * * *

(4) * * *

"(h) * * *

"(i) * * *

"(j) * * *

"(k) * * *

"(l) Any person who violates any order issued by the commission or board under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation which shall accrue to the United States and may be recovered in a civil action brought by the United States. * * *"

in New York Times, October 21, 1914, P. 5] which sat not as an Appellate Court but as a court of equity enforcing, modifying or setting aside the orders of the FTC. C. E. Niehoff & Co. v. Federal Trade Commission, 241 F.2d 37, 42 (7 Cir. 1957); Federal Trade Commission v. Fairyfoot Products Co., 94 F.2d 844 (7 Cir. 1938); Butterick v. Federal Trade Commission, 4 F.2d 910 (2 Cir. 1925); L.B. Silver v. Federal Trade Commission, 292 Fed. 752, 753 (6 Cir. 1923). See e.g. 51 Cong. Rec. 14927, 14768-70, 14251-52, 16281 (1914), H. Rep. No. 1142, 63 Cong. 2d Sess. p. 19; Henderson, Federal Trade Commission (1924) pp. 77-78. In addition to examining the prospective application of the order, restraining the violation of the Act, the Court of Appeals had to determine the legality of the order, whether the facts properly found by the FTC constituted a violation of the Act. See Federal Trade Commission v. Broch and Co., 368 U.S. 360, 364 (1962); Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 473-474 (1952); Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 612 (1946); Federal Trade Commission v. Fairyfoot Products Co., 94 F.2d 844 (7 Cir. 1938); See Beer, supra p. 420. By virtue of the Finality Act, if judicial review is not sought, the cease and desist order becomes final, and an adjudication that a violation of the Clayton Act has been committed. That act brought to Clayton Act-FTC orders the same binding effect that had been given FTC orders under the FTC Act. See Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 54 (1948); United States v. Willard Tablet Co., 141 F.2d 141, 143 (7 Cir. 1944); George H. Lee Co. v. Federal Trade Commission, 113 F.2d 583 (8 Cir. 1940); United States v. Piuma, 40 F.Supp. 119 (S.D. Calif. 1941); affirmed 126 F.2d 601 (9 Cir. 1942); See 152 ALR Anno. 1198 (1944).

The "proceeding in equity" therefore was not the Commission proceeding but the proceeding before the Court [fol. 78] of Appeals from which a judgment or decree would issue determining and restraining a violation of the Act. With development of "final orders" in FTC proceedings, whether the order becomes final by expiration of time in which to seek review or by a judgment or decree from a

Court of Appeals, the proceeding resulting in such final order or decree, is a "proceeding in equity" and a "civil proceeding" within the meaning of Section 5, and an adjudication of a violation of the Clayton Act.

The vital effect of these changes is overlooked by appellant in its strong reliance upon the 1923 decision in Proper v. John Bene and Sons, Inc., 295 Fed. 729 (E.D. N.Y. 1923). That opinion held that a FTC proceeding under the FTC Act is not a "proceeding in equity . . . instituted by the United States" to restrain violations of the "antitrust laws" within Section 5 of Clayton Act. In Proper, the plaintiff brought a private antitrust suit for treble damages for violations of the Clayton, Sherman and FTC Acts. A proceeding had been brought against the defendant by the FTC under the FTC Act and the plaintiff sought to have the bare FTC order, unenforced by the courts, admitted as prima facie evidence under Section 5.

The court denied it for several reasons: that the proceeding before the Commission was not a "proceeding in equity"; that the FTC order was not a "final judgment or decree"; that the proceeding by the FTC to enforce Section 5 of the FTC Act was not a suit under the antitrust laws as that term is used in Section 5 of the Clayton Act. There are no findings in Proper contrary to our conception of the law as it stood in 1923. The Court in Proper dealt with a 1923 FTC proceeding under the FTC Act. We have before us a proceeding under the Clayton Act brought by an expanded 1960 FTC.

With that thoroughly in mind, the 1945 decision of Brunswick-Balke Collender Co. v. American Bowling and Billiard Corp., 150 F.2d 69 (2 Cir. 1945), cited by Judge [fol. 79] Augelli below, becomes far more reflective of the problem presented by this appeal. There the Court held that an FTC proceeding brought for violations of Section 3 of the Clayton Act was a "final judgment or decree" rendered in a "suit or proceeding in equity brought by or on behalf of the United States" within Section 5 of the Act. In so deciding, the Court had mistaken the scope of the Act of March 21, 1938, c. 49, 52 Stat. 111. 15 U.S.C. 45 (1958). That statute did not amend Section 11 of the Clayton Act

but only Section 5 of the FTC Act, and on rehearing the Court reversed itself, concluding that because the order was not "final", it was inadmissible as prima facie evidence under Clayton Section 5, citing Proper v. John Bene & Sons, Inc., supra. It is obvious that if the order had been final, as it is today, (by virtue of the Finality Act), the Court would have regarded the "final order" admissible under Section 5. See Fifth and Walnut v. Loew's, Inc., 176 F.2d 589, 593 (footnote 9) (2 Cir. 1949).

3M has argued that Section 5(b) (the tolling provision) is dependent upon Section 5(a) (the prima facie evidence provision), and that the two subsections must be construed as a unit. One theory advanced is that the express statement in Section 5(a): That this section shall not apply to "consent judgments or decrees" should be brought down to Section 5(b) and interpreted so as to prevent the tolling of the statute of limitations where the civil or criminal proceeding is terminated by a consent order. Apart from the legislative history which negates such construction 51 Cong. Rec. 15825-15826; 16046-47; 16276 (1914), it would seem that if the proviso were to apply to both paragraphs, there would be no reason to insert it after the first. As the district court further pointed out: "The proviso is grammatically a part of the single sentence which comprises Section 5(a), separated only by a colon." See Flora v. United States, 362 U.S. 145, 150 (1960). More important is the substantive application of the consent judgment proviso. While the proviso deals [fol. 80] with the termination of the government suit, the tolling provision operates during its "pendency". Section 5(a) permits the use of government judgments and decrees as prima facie evidence, only as to matters actually decided in the government suit. Emich Motors Corp. v. General Motors, 340 U.S. 558 (1951). 5(b) tolls the statute of limitations as to "matters complained of" whether or not they are actually decided. Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561 (10 Cir. 1962). To construe this section as appellant desires, would be to force every private antitrust claimant caught between the running of the statute and the possible consent termination of the government proceeding, to start suit without the benefits

of the government action. See Twin Ports Oil Co. v. Pure Oil Co., 26 F.Supp. 366, 372-376 (D.C. Minn. 1939), affirmed on other grounds, 119 F.2d 747 (8 Cir. 1941); Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846 (8 Cir. 1952).

The defendant 3M also suggests that proceedings which cannot yield judgments and decrees applicable as prima facie evidence under Section 5(a) cannot toll the statute of limitations under Section 5(b). The legislative history is sparse on the interrelationship between the two sections. The only clear Congressional commentary on this point occurred in the debates on the House Clayton bill, (51 Cong. Rec. 9165, 9488-90 (1914)), which had no provision for the enforcement of its sections by the FTC; [See H. Rep. No. 627, 63 Cong. 2d Sess. (1914)]; so that the question whether FTC proceedings to enforce the Clayton provisions tolled the statute of limitations was not squarely met by the 1914 legislators. The House debates support 3M's view solely to the exent that the tolling provision was to enable the private claimant to reap the benefits of the government action, i.e., the use of a government judgment and decree as prima facie evidence. Union Carbide & Carbon Corp. v. Nisely, 300 F.2d 561 (10 Cir. 1962). But see 51 Cong. Rec. 16003 (1914). In addition to the [fol. 81] decisions noted infra (see footnote 14, infra), other courts have regarded the two subsections as related and dependent. See Sun Theatre v. R.K.O. Radio Pictures, 213 F.2d 284, 289-293 (7 Cir. 1951); Momand v. Universal Film Exchange, 43 F.Supp. 996, 1012 (D.C. Mass. 1942), affirmed 172 F.2d 37 (1 Cir. 1948). However, we see no reason why final FTC orders enforcing the Clayton Act should not be admitted as prima facie evidence under Section 5(a). Brunswick-Balke Collender Co. v. American Bowling and Billiard Corp., 150 F.2d 69 (2 Cir. 1945). But cf. United States v. United Shoe Machinery Corp., 89 F.Supp. 349, 356 (D.C. Mass. 1950). (Final disposition of case 110 F.Supp. 294 (D.C. Mass. 1953), affirmed per curiam 346 U.S. 894 (1953)). While our 1914 legislators would not have accepted a bare FTC order of that period as admissible, the finality given such order through a decree emanating from the Court of Appeals would have re-

sulted in its being considered a "final judgment or decree" within Section 5(a). Today of course, under the Finality Act, the orders of the FTC become final adjudications of antitrust violations by expiration of the time in which review can be sought.

The operation of Section 5(a) has been explained to some extent by Emich Motors Corp. v. General Motors, 340 U.S. 558 (1951). Judgments and decrees in government suits are only prima facie evidence of antitrust violations. The defendant still has his "day in Court" on that issue. See Harrison v. Paramount Pictures, 115 F.Supp. 312 (E.D. Pa. 1953), affirmed 211 F.2d 405 (3 Cir. 1954). He is entitled to offer rebuttal evidence to break down the force and effect of that prima facie evidence. 51 Cong. Rec. 13856-13858 (1914); see the authorities collected in Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 716-727 (9 Cir. 1959). See also 65 Harv. L.Rev. 1400 (1952). 3M argues that FTC orders cannot be admitted because of the more liberal evidentiary rules of the administrative agency. This plus the broader administrative process [fol. 82] might place the FTC proceeding on a somewhat unequal footing with a similar judicial proceeding brought by the Department of Justice. See United States v. Morton Salt Co., 338 U.S. 632, 641-643 (1950); Hunt Foods & Industries, Inc. v. Federal Trade Commission, 286 F.2d 803 (9 Cir. 1961). But see United States v. Household Goods Movers Investigation, 184 F.Supp. 689 (D.C. D.C. 1960). The differences are at most peripheral and any attack along those lines would go to the weight of the prima facie evidence, not to its propriety. The use of administrative orders as prima facie evidence in private suits is not new to our law. Under the Interstate Commerce Act, 49 U.S.C. Section 16 (13) (1958) a reparation order of the ICC is admissible as prima facie evidence in an action for damages by a shipper against a defendant railroad, found by the ICC to have exacted unreasonable rates.[13] Meeker & Co. v. Lehigh Valley R.R., 236 U.S. 412, 430 (1915);

[13] When the FTC bill reported out of the Senate Committee June 13, 1914 [S.Rep. No. 597, 63 Cong. 2d Sess. (1914)], it reflected a desire for a Commission with the same "effective powers

Pennsylvania R. Co. v. Weber, 257 U.S. 85 (1921); Western Maryland Ry. v. Penn Veneer Co., 92 F.2d 146 (3 Cir. 1937). While we are satisfied that final orders in FTC Clayton Act proceedings are admissible under Section [fol. 83] 5(a) as prima facie evidence, in the case at bar, N. J. Wood will not get the benefit of Section 5(a) because the FTC proceeding involved ended in a consent order, apparently before any testimony was taken. We have reached this question solely because there was some evidence in the legislative history of the section that the two subsections are to be construed together, as other courts have subsequently held. However, the decision of the court below that the two subsections should not be regarded as inter dependent does have substantial support.

The above mentioned intention in 1914 does not seem as plain in 1955 when Congress amended Section 5 and

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and usefulness as had been given the ICC." 51 Cong. Rec. 10376 (1914). The floor debates in the Senate reveal a recurring Congressional feeling for an FTC functioning like the ICC. Distinctions and similarities were consistently noted. Representative Covington said:

> "There is, however, a perfect analogy between the former power of the Interstate Commerce Commission under the Cullom Act and the power of the Federal Trade Commission. Under the Cullom Act, the Interstate Commerce Commission had the power to determine whether an existing rate was unreasonable, and, if it is so found, to order the railroad to cease and desist from charging that rate.
>
> "The Federal Trade Commission will have precisely similar power in regard to an existing method of competition. It is instructive therefore to bear in mind that the orders of the Commission under that act were not final but were subject to review by the courts." 51 Cong. Rec. 14932 (1914).

Also, in the Senate report in the Clayton Bill (S. Rep. No. 698, 63 Cong. 2d Sess. 1914), the Committee recommended the change in Section 5(a) from "conclusive evidence" to "prima facie evidence". At P. 45, it drew the analogy of the use of a tax deed as evidence of title, citing Cooley in Taxation, 521 5th Ed. 1886, and Marx v. Hanthorn, 148 U.S. 172, 183 (1893). These same thoughts are expressed in the ICC-Meeker case, supra, which cites Marx v. Hanthorn. Such Congressional thinking tends to show that the 1914 legislator would not be adverse to the use of affirmed FTC orders as prima facie evidence.

divided Section 5 into subsections (a) and (b). Act of July 7, 1955, c. 283, Section 2, 69 Stat. 283. The committee reports on the 1955 amendment to Section 5, plainly intimated a broader reason for tolling the statute of limitations. By 1955, the Supreme Court had pointed to the limited practical value of the prima facie evidence to a private suitor. See Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954); Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 102-103 (1954). The real importance of government proceedings that accrues today to private suitors is the availability to them of the government's case against the defendant. Section 5(b) enables "a plaintiff to take advantage of facts uncovered" as a result of the government proceedings. New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co., 216 F.Supp. 507 at P. 510 (D.C. N.J. 1963). In the Senate Report on the 1955 amendment to Section 5 (b) the Committee wrote:

> "Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit, if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate [fol. 84] his own damages, assess the strength and validity of his suit, and prepare and file his complaint". Senate Report No. 619, June 21, 1955, U. S. Code Cong. & Ad. News, 84 Cong. 1st Sess. P. 2332.

Whether or not this shift in congressional intent was there fully outlined, it seems to us that FTC orders and FTC proceedings presently enjoy the efficacy of court proceedings for purposes of Section 5, and that in this appeal the FTC proceeding against 3M to restrain a violation of Clayton Section 7, tolled the statute of limitations and that N. J. Wood's complaint was timely.

Three recent decisions[14] on the issue before us all relied on the old Proper case, supra, and summarily re-

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[14] Highland Supply Corporation v. Reynolds Metals Company, 221 F.Supp. 15 (E.D. Mo. 1963), reversed in part (but affirmed

jected the Brunswick Balke-Collender opinion. In so doing, those courts clearly overlooked the affirmative statutory distinction between FTC proceedings under the FTC Act and under the Clayton Act and that distinction's vital effect upon Section 4 and Section 5 of the Clayton Act; otherwise they could not have reasonably adopted the obsolete Proper rule. To do so at this stage is to consider the present question in a vacuum and simply forget all about the present governing statutory formula for the enforcement of the Clayton Act and the increased powers that have come to the FTC.

It is also clear that the status of the Brunswick-Balke opinion of Judge Frank was fundamentally misunderstood. The sound legal principle there pronounced that final FTC orders in Clayton Act proceedings are admissible within Section 5(a), was not reversed. It was simply not usable because, as was discovered, there was no Finalty Act at the time, dealing with FTC-Clayton Act orders. When Congress passed the Finalty Act in 1959, it simply [fol. 85] vitalized the principle of Brunswick-Balke as to Section 5(a). We are satisfied that this principle is good law and good common sense and that its logical extension is applicable to the Section 5(b) question here involved.

Finally, 3M claims that even if the FTC proceeding tolled the statute of limitations, it preserved only the Clayton counts and the Sherman counts are barred. The statutory language of Section 5(b) tolls the statute as to "any matter complained of" in the Government suit. One of the overt acts upon which N. J. Wood's conspiracy count was based was the acquisition of IWI by 3M.[15] While "con-

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on the issue at bar) 327 F.2d 725 (8 Cir. 1964); Volasco Products Co. v. Lloyd A. Fry Roofing Company, 223 F.Supp. 712 (E.D. Tenn. 1963); Farmington Dowel Products Co. v. Forster Mfg. Co., Inc., 223 F.Supp. 967 (D.C. Me. 1963).

[15] Defendant Essex Wire is not before us on appeal, but it appears from the record that the trial judge below dismissed it with prejudice only as to the Clayton counts and not as to the Sherman counts. Though we do not decide the question, it would appear that the statute of limitations is tolled only as to named defendants in the Government suit. Sun Theatre Corp. v. R.K.O. Radio Pictures, 213 F.2d 284 (7 Cir. 1954); Momand v. Universal Film Exchanges, 172 F.2d 37 (1 Cir. 1948).

tract of conspiracy" was not at issue before the FTC, the acquisition of IWI was. N. J. Wood's complaint alleges that this act of acquisition was in furtherance of a conspiracy to restrain competition and to monopolize trade. There was a "substantial identity of subject matter." Union Carbide and Carbon Corporation v. Nisley, 300 F.2d 561, 570 (10 Cir. 1962). We, therefore hold that the acquisition of IWI was a "matter complained of" within Section 5(b) and that the statute of limitations was tolled as to the Sherman as well as the Clayton counts. Union Carbide, supra; Steiner v. 20th Century-Fox Film Corporation, 232 F.2d 190, 196 (9 Cir. 1956).

The judgment of the District Court will be affirmed.

[fol. 86]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,487

NEW JERSEY WOOD FINISHING COMPANY,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY and ESSEX WIRE CORPORATION,

MINNESOTA MINING AND MANUFACTURING COMPANY, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: Biggs, Chief Judge, and McLaughlin and Hastie, Circuit Judges.

JUDGMENT—May 20, 1964

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order filed April 19, 1963, entered April 22, 1963, of the said District Court be, and the same is hereby affirmed, with costs.

May 20, 1964

[File endorsement omitted]

[fol. 87]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14487

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—June 5, 1964

Pursuant to Rule 36 (2) of this Court, it is Ordered that issuance of the mandate in the above cause be, and it is hereby stayed until July 6, 1964.

McLaughlin, Circuit Judge.

[fol. 88] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 89]

SUPREME COURT OF THE UNITED STATES

No. 291—October Term, 1964

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner,

vs.

NEW JERSEY WOOD FINISHING COMPANY.

ORDER ALLOWING CERTIORARI—October 19, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

The Solicitor General is invited to file a brief expressing the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.